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IN THE SUPREME COURT
OF THE UNITED STATES

No. , October Term, 1982

DENNIS CALLAWAY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF WISCONSIN SUPREME COURT (AND APPENDIX)

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QUESTIONS PRESENTED

I. DOES THE FOURTH AMENDMENT PROHIBIT THE POLICE FROM WARRANTLESS SEIZURE OF AN AUTOMOBILE FOR NON-INVESTIGATORY PURPOSES FOLLOWING ITS DRIVER'S ARREST ON A TRAFFIC OFFENSE, ABSENT SOME SHOWING OF REASONABLE CAUSE?

II. ASSUMING THE IMPOUNDMENT OF AN AUTOMOBILE TO BE PROPER, DOES THE FOURTH AMENDMENT PROHIBIT THE POLICE FROM CONDUCTING A WARRANTLESS ROUTINE INVENTORY SEARCH ABSENT PERMISSION FROM THE OWNER OR PERMISSIVE USER WHEN HE/SHE IS PRESENT AND ABLE TO GIVE SUCH CONSENT?

III. IS ENTRY INTO A LOCKED GLOVE COMPARTMENT DURING A ROUTINE INVENTORY SEARCH OF AN IMPOUNDED AUTOMOBILE UNREASONABLE IN SCOPE UNDER THE FOURTH AMENDMENT?

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v.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF WISCONSIN SUPREME COURT (AND APPENDIX)

The petitioner, Dennis Callaway, prays that a writ of certiorari issue to review the judgment of the Wisconsin Supreme Court, entered March 26, 1982.

OPINIONS BELOW

The trial court entered a pretrial order suppressing marijuana seized from Mr. Callaway's automobile. The Wisconsin Court of Appeals affirmed the order in State v. Callaway, 103 Wis.2d 389, 308 N.W.2d 897 (Ct. App. 1981), reproduced in the Appendix at 101-108. The

Wisconsin Supreme Court reversed both lower courts, 106 Wis.2d 503, 317 N.W.2d 428 (1982), reproduced in the Appendix at 109-129.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). The judgment of the Wisconsin Supreme Court, reversing the pretrial suppression order, was entered March 26, 1982.

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The facts are undisputed.

Petitioner (hereinafter "Mr. Callaway") was charged by criminal complaint with possessing a controlled substance, tetrahydracannabinol, with intent to deliver, contrary to sec. 161.41(1m)(b), Wis. Stats. The sole issue herein is whether the police properly seized the marijuana which formed the basis for the charge. The following facts were adduced at the preliminary hearing ("P.H.") and at the suppression hearing ("S.H.").

Mr. Callaway was arrested in West Bend, Wisconsin, on May 3, 1979, at 7:13 p.m. on an outstanding traffic warrant. At the time, Mr. Callaway was the sole driver-occupant of the

vehicle he was driving. The arresting officer, Michael Quick, advised Mr. Callaway the bond for this offense was $51.00, which Mr. Callaway was unable to immediately post (S.H. 4-7).

Mr. Callaway pulled his car over, in response to Officer Quick's signal, in a no-parking zone. However, lawful parking existed, until 2:00 a.m., within twenty (20) feet of that site.

According to Officer Quick, the police department policy was that every vehicle whose driver was arrested was subject to impoundment, whether or not illegally parked, unless someone else was available to operate the car (P.H. 4, 9-10; S.H. 16). In other words, even if Mr. Callaway had been pulled over in a legal parking zone, his car would still have been towed.

Officer Quick asked if Mr. Callaway could secure another driver for the car, but Mr. Callaway stated he did not any one available "at that time" (S.H. 8, 16-17). Officer Quick did not allow Mr. Callaway any phone calls to find another driver (S.H. 17). Officer Quick could

not deny that Mr. Callaway requested five minutes to provide the $51.00 bail (S.H. 13).

Officer Quick then offered Mr. Callaway the option of either paying to have his car towed to the impounding lot, or having the police drive it there. Officer Quick "indicated to him if we had the keys it would be easier, otherwise we'd call a tow truck and he'd have to pay for it" (P.H. 10; S.H. 8, 22). Under either option, the car would be under police impoundment; Officer Quick did not offer Mr. Callaway the option of having the car towed to his residence or some other place (S.H. 32).

Seeing on the rear seat a "bong" (a pipe Officer Quick associated with marijuana use), the officer called for back-up assistance (P.H. 4). The car was then driven by the police to the police garage where it was subjected to a complete inventory search (S.H. 32). The search included entry into the locked glove compartment, with a key, where some marijuana was found in a plastic bag (S.H. 34).

The car was then taken to the police impoundment lot which, though secured at night had

not prevented cars on the lot from suffering "frequent acts of vandalism and theft." 106 Wis.2d at 517; 317 N.W.2d at 436.

Following the suppression hearing, the trial court ordered the evidence seized during the inventory search suppression. The court of appeals affirmed; the supreme court reversed. This petition for a writ of certiorari is from the judgment of reversal of the Wisconsin Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NOT SPECIFICALLY ADDRESSED THE QUESTION OF WHETHER THE FOURTH AMENDMENT REQUIRES REASONABLE CAUSE FOR THE NON-INVESTIGATORY SEIZURE OF AN AUTOMOBILE. THE WISCONSIN SUPREME COURT'S DECISION CREATES A CONFLICT AMONG THE LOWER COURTS ON THIS POINT, THEREBY NECESSITATING RESOLUTION BY THIS COURT. FURTHERMORE, THE LOWER COURT'S DECISION IS AT ODDS WITH WELL-ESTABLISHED LAW ENUNCIATED BY THIS COURT RELATING TO CONSENT TO SEARCH.

A. The lower court ratified the impoundment of Mr. Callaway's automobile without a showing of any necessity, thus conflicting with numerous other lower court decisions.

The West Bend police rules require seizure of an automobile where the arrestee-driver is unable to immediately secure an alternative

custodian for the car. The policy lays down a hard-and-fast rule which ignores, indeed prohibits the police from even considering, whether there is any necessity (e.g., traffic hazard) for the seizure.

The state conceded that Mr. Callaway's car could reasonably have been left parked lawfully at the scene, but claimed that, "[i]t is not unconstitutional for the police to fail to offer other alternatives. These are decisions which are better left to the judgment of police department officials than to the courts. A policy of offering only the alternative of having someone move the car is not facially unreasonable." State's brief-in-chief in Wisconsin Supreme Court, p. 32.

The Wisconsin Supreme Court effectively adopted the state's position, despite the rulings of the lower courts that the seizure was illegal because it was unsupported by any necessity. There is no evidence in this record to support an inference that the automobile presented any kind of traffic or other hazard to

the public, or that any danger was presented to it.

The threshold issue is thus whether Mr. Callaway's car was lawfully seized. For reasons discussed below, the Wisconsin Supreme Court's treatment of this threshold issue is irreconcilably odds with the analysis employed by the vast majority of lower courts to deal with this issue.

While this court has sanctioned the use, under some circumstances, of an inventory search of a lawfully impounded automobile, South Dakota v. Opperman, 428 U.S. 364 (1976), it has never discussed the precise issue of what constitutes a lawful impoundment. In Opperman there was no challenge to the seizure of the illegally-parked and long-abandoned vehicle. As this court noted, "[t]he Vermillion police were indisputably engaged in caretaking search of a lawfully impounded automobile." 428 U.S. at 375. See also State v. Goodrich, 256 N.W.2d 506, 509 (Minn. 1977) ("There was no dispute as to the propriety of the act of impoundment itself [in

Opperman]"; and Benavides v. State, 600 S.W.2d 809, 911 (Tex. Cr. App. 1980) ("The Supreme Court in Opperman and in decisions since then has failed to earnestly discuss what is necessary for an impoundment of automobile to be considered a 'reasonable seizure.')

The inventory search "is a relatively new exception to the warrant requirement and is still in a sensitive, developing state. ... It is apparent from the case law that there is still some confusion among law enforcement officers, prosecutors, and judges about the nature and purpose of this unique type of warrantless search." Miller v. State, 403 So.2d 1307, 1311 (Fla. 1981). Given the explosion of cases dealing with this emergent doctrine, this court should offer a guiding hand while the doctrine is still in a sensitive, developing stage, particularly in light of the serious departure of Callaway from recent trends.

Virtually all cases - save perhaps Callaway- to address the issue in recent years have concluded that, prior to a non-investiga-

tory impoundment, the police must have "reasonable cause" (i.e., "substantial need") for the seizure. E.g., State v. Houser, 45 Wash.2d 142, 622 P.2d 1218 (1980); State v. Bales, 15 Wash. App. 834, 552 P.2d 688, 689 (1976); Drinkard v. State, 584 S.W.2d 650, 653 (Tenn. 1979); State v. Slockbower, 79 N.J. 1, 397 A.2d 1050, 1053 (1979); Nealy v. State, 400 So.2d 95, 96-97 (Fla. App. 1981); Altman v. State, 335 So.2d 626, 628 (Fla. App. 1976); Arrington v. United States, 382 A.2d 14, 18 (D.C. App. 1978); People v. Nagel, 17 Cal. App.3d 492, 496, 95 Cal. Rptr. 129, 132 (1971); State v. Goff, 272 S.E.2d 457, 461, n. 6 (W. Va. 1980); cf. Benavides v. State, 600 S.W.2d 809, 811 (Tex. Cr. App. 1980). Accord, Moylan The Inventory Search of an Automobile: A Willing Suspension of Disbelief, 5 U. Balt. L.R. 203, 218 1976).

A leading fourth amendment commentator similarly posits that impoundment of an arrestee's vehicle is unreasonable unless the police first ask the arrestee for reasonable alternative dispositions and attempt compliance

with same. 2 La Fave, Search and Seizure, § 7.3(c), pp. 559-560. Moreover, consistent with the idea that reasonable cause must underly an impoundment, La Fave argues that the driver's wish to leave the car lawfully parked at the scene should be respected when reasonable. Id. Accord, Rule 603(B), Model Rules for Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles (Ariz. St. U. College of Law and Police Foundation 1974) cited in dissent, 106 Wis.2d at 533-534, 317 N.W.2d at 443. La Fave further posits that immediate seizure is improper when - as here - the driver is arrested on a minor traffic offense, at least until the arrestee has had a reasonable opportunity to post bail. Id., p. 556.

Opperman itself suggests that impoundment may be limited to instances where "vehicles [are] impeding traffic or threatening public safety and convenience." 428 U.S. at 369. Certainly nothing in Opperman or any other decision by this Court hints that impoundment is proper where unsupported by some police need.

In the present case, the Wisconsin court of appeals properly paid obeisance to this universally recognized principle of necessity. 103 Wis.2d at 399-402, 308 N.W.2d at 902-904. The Wisconsin Supreme Court, on the other hand, sloughed over this threshold issue without discussing it in any meaningful manner. 103 Wis.2d at 513-514; 317 N.W.2d at 434.[1] The Callaway court's failure to discuss necessity for the seizure distinguishes the case from all other impoundment cases and seriously impedes development in this area of the fourth amendment.

The key feature to this case is that the state has never claimed that the seizure was justified under some theory of "reasonable necessity." In fact, the West Bend policy mandates the seizure of every car whose driver has been arrested, where an alternative driver is not immediately available. Thus, the police did not, and could not have by local policy, explored

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[1] The court's ruling appears to be based primarily on a consent theory, which is discussed in the section below.

options to seizure, even to determine whether some necessity existed for the seizure. "Necessity" was conferred by a rigid, unyielding policy which works a predetermined result in every West Bend traffic arrest, including Mr. Callaway's.

The Callaway court did note, in cursory fashion, certain conclusions which arguably might support a finding of necessity. 102 Wis.2d at 513; 317 N.W.2d at 434. These matters include: (1) the possibility of vandalism to the car and consequent negligence suit against the police; (2) the possibility the car would have remained illegally parked on the street after 2:00 a.m.; (3) the absence of any indication the seizure and search were pretextual. Mr. Callaway discusses these matters in order.

There is no evidence whatsoever that Mr. Callaway's car - which was pulled over within sight of the police department - would have been subjected to vandalism. The court's conclusion is based on mere speculation.

Not only are there no facts to support the inference of vandalism, the court's conclusion relating to a possible negligence suit is without legal support. No authority is cited for the proposition the police might have incurred any liability for the car. However, as La Fave notes, if the police do not seize the car, they do not assume responsibility for it or its contents. 2 Search and Seizure, § 7.3, p. 560. See also State v. Hardman, 17 Wash. App. 910, 567 P.2d 238, 242 (1977): "[T]he absence of circumstances to justify an impoundment should be a conclusive determination to any claim against the police for vandalism or theft of the vehicle after it was locked and allowed to remain legally parked." Accord, State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977); Mozetti v. Superior Court, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84, 88-89 (1971).

Moreover, if such a threat of vandalism in fact existed, there is no reason why the police could not have asked Mr. Callaway to assume any risk and waive any claim against the police.

Cf. People v. Miller, 7 Cal.3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972).

Ironically, the only evidence adduced as to vandalism related to break-ins at the impoundment lot. 106 Wis.2d at 517; 317 N.W.2d at 436. In fact, this threat of damage to the vehicle served as the justification for the ensuing inventory search. If, then, the police were not exposed to liability before the seizure, they certainly were once they assumed custody of the car and removed it to a place known to present hazards. The vandalism justification thus takes it place alongside the argument that the village had to be destroyed in order to save it.

Recent case law is unanimous that, if the arrestee's car can be left lawfully parked at the scene, impoundment is impermissible. G.B. v. State, 339 So.2d 696 (Fla. App. 1976); State v. Jenkins, 319 So.2d 91, 94 (Fla. App. 1975); Session v. State, 353 So.2d 854, 855 (Fla. App. 1977); State v. Houser, 45 Wash.2d 143, 622 P.2d 1218, 1224 (1980); State v. Bales, 15 Wash. App. 834, 552 P.2d 688, 690 (1976); Slockbower; State

v. Ercolano, 79 N.J. 25, 397 A.2d 1062, 1067 (1979); State v. Crosby, 403 So.2d 1217 (La. 1981); People v. Nagel, 17 Cal. App.3d 492, 497, 95 Cal. Rptr. 129, 132-133 (1971); People v. Landa, 30 Cal. App.3d 489, 491, 106 Cal. Rptr. 329, 331-332 (1973); State v. Darabis, 159 Ga. App. 121, 282 S.E.2d 744 (1981); Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974); Manalansan v. State, 45 Md. App. 667, 415 A.2d 308 (1980); cf. United States v. Pannell, 256 A.2d 925 (D.C. App. 1969) (car parked on police lot). Accord, 2 Search and Seizure, § 7.3, p. 559 (if car can be left lawfully parked at scene and driver requests it, seizure would be improper); Model Rule 603(B).

These cases cannot be meaningfully distinguished from the present one. Their shared, irreducible principle is that seizure must be predicated on some reasonable cause. No such cause existed, or was even claimed by the state to exist, in the present case. Mr. Callaway's car could have been left lawfully parked at the scene during his temporary absence, without im-

peding traffic or causing any sort of hazard to the public.

The fact that parking was illegal after 2:00 a.m., some seven hours after the arrest, is unimportant. As noted by one court:

> This argument is without merit. First of all no violation of the ordinance had yet occurred. We cannot agree that a pre-violation seizure of an automobile is permissible. Furthermore there was no testimony that it was standard procedure to impound a vehicle for this violation or whether the issuance of a citation was the usual procedure.

Benavides v. State, 600 S.W.2d 809, 812 (Tex. Cr. App. 1980).[2/]

These matters are further irrelevant for the simple reason they were not relied on by the police. Seizure was accomplished pursuant to a departmental policy which purportedly protects against arbitrary incursions into citizens' privacy. Opperman, 428 U.S. at 374-375. The

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2/ Mr. Callaway was pulled over in an illegal parking zone. However, the state conceded that it could easily been moved twenty feet to a lawful zone. State's brief, p.32. Moreover, case law is unanimous that in such situations the car should be moved to the lawful zone and left parked. Dixon, 327 A.2d at 527; Nagel, 95 Cal. Rptr. at 133; Bales, 552 P.2d at 690.

police themselves saw no possibility of vandalism, and were not concerned that the car might have been illegally parked at some future time. They were prohibited, under the policy, from evaluating such conditions.

The real issue here is whether West Bend's rigid policy is reasonable under the fourth amendment. The very inflexibility of the policy raises a "suspicion . . . that the policy is intended only as a subterfuge for a warrantless search without probable cause." Crosby, 403 So.2d at 1220 (invalidating seizure based on "overly restrictive" departmental policy permitting only family members to retrieve arrestee's car, where car could have been safely parked a short distance from the arrest).[3/]

As shown above, the decided trend of recent cases is to encourage the police to leave, where possible, an automobile lawfully parked at the

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3/ The Callaway court claimed that Mr. Callaway did not contend the seizure was pretextual. This is not true. Brief in Wisconsin Supreme Court, p. 21. See also dissent, 106 Wis.2d at 523, n. 2, 317 N.W.2d at 438, n.2.

scene of the driver's arrest. Callaway represents a significant departure from this line of authority, and in so doing creates bad policy as well as bad law.

First, Callaway ignores the privacy rights of automobile owners. As shown below, under Wisconsin law, the police may pry into virtually every area of an impounded vehicle, locked or unlocked, without the owner's consent. Seizure of a car, then, signifies the commencement of a serious intrusion into an owner's private compartments. While all impoundment cases at least attempt to balance police need against owner's privacy, the Callaway court inexplicably made no such attempt. E.g., Slockbower, 397 A.2d at 1053; State v. Hardman, 117 Wash. App. 910, 567 P.2d 238, 240 (1977). (The Callaway court's only venture into this area was to hold that any expectation of privacy in a motor vehicle is less than that attendant other types of property. 106 Wis.2d at 508-510, 317 N.W.2d at 431-432.

Second, the decision ironically will overburden the police and hamper them in performance

of their duties. As argued above, the decision will only increase rather than minimize, the exposure of the police to civil liability. Moreover, to the extent the police are encumbered by this supposedly benign procedure, they will be unable to truly protect the community from crime and other public hazards. As the dissent noted, "one-fourth to one-third of the West Bend Police officers were apparently busy with the defendant or his car for some time between 7:15 and 8: 15 p.m." 106 Wis.2d at 521, n. 1; 317 N.W.2d at 437, n. 1. The unnecessary expenditure of precious manpower is not, Mr. Callaway submits, wise policy.

If the police had sufficient personnel and time to move Mr. Callaway's car off the streets, and to conduct an intensive search, they could as easily have offered Mr. Callaway the option of having the car driven or towed to a place of his own choosing. The police were prohibited from offering such an alternative under their department policy. Assuming the removal of the car to have been necessary at all, the Callaway

court failed to discuss why the car could not have been taken to a place of Mr. Callaway's choosing. This failure is grounded in the court's failure to endow the car with any protection over its private contents, as required by the fourth amendment.

B. The decision is irreconcilable with well-established authority to the effect that "consent" cannot be demonstrated by mere acquiescence to authority.

The Callaway court placed primary reliance on a consent-theory as a basis for upholding the seizure:

> "Callaway stated that he did not know of (sic) anyone who could come to get the car at that time and, therefore, he freely waived his opportunity to avoid the impoundment." 106 Wis.2d at 512, 317 N.W.2d at 433.
>
> "We . . . hold that the facts of this case satisfy that standard as Callaway was informed that the car would be impounded if he could not suggest another driver the police could contact and he consented to the impoundment of the vehicle and voluntarily surrendered his keys to the officer." 106 Wis.2d at 513-514, 317 N.W.2d at 434, emphasis in original. 4/

4/ Consent, it should be noted was not relied on by the police, who seized the car simply because they were required to do so by policy.

Mr. Callaway does not dispute the unremarkable idea that an individual can consent to the seizure of his/her car. However, if under the present facts Mr. Callaway is held to have consented to the seizure, then the term "consent" will have been stripped of all meaning in the fourth amendment context.

The instant facts show quite clearly that any "consent" to seizure was in fact no more than mere acquiescence to lawful authority. Mr. Callaway was told that if he could not produce someone to take charge of the car, the vehicle would be seized. Mr. Callaway was not given any choice in the matter. He was not, for example, asked if he wanted the car towed or driven to his home or left parked at the scene.

This Court has consistently held that mere acquiescence to a claim of colorably lawful police coercion cannot constitute "consent" to a

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4/ (cont.)
Nor was consent argued by the state, which argued simply and solely that this policy was reasonable on its face. Thus it is not surprising that the holding conflicts with well-established rulings by this Court.

search or seizure. Lo Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979); Bumper v. North Carolina, 391 U.S. 543, 549-550 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921).

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coericon. Where there is coercion there cannot be consent.

Bumper at 549.

The Bumper rule of mere acquiescence is not limited to claims of a non-existent warrant. It extends to situations where the search or seizure is "demanded under color of office," Johnson, 333 U.S. at 13, i.e., where the individual is led to believe he has no choice in the matter:

> Coercion which will invalidate consent and render a search unreasonable in constitutional reference is not solely confined to a consent obtained by threats or force, but is equally operative in those situations where the consent is granted only in submission to a claim of authority. ... Where an officer without using physical violence or threats conveys to the defendant by affirmative misrepresentations that he has the right to search without a warrant as in the instant case, the defendant's consent

> to the search given in response to such false assertions must be regarded as the mere submission of a law abiding citizen to an officer of the law and cannot be construed as a valid waiver of his constitutional rights against search and seizure.

State v. Barlow, 320 A.2d 895, 900 (Me. 1974). Accord, United States v. Sanchez, 635 F.2d 47, 59 (2d Cir. 1980) and cites therein; United States v. Molt, 444 F. Supp. 491 (E.D. Penn.) aff'd 589 F.2d 1247 (3d Cir. 1978); Jones v. Unknown Agents of Federal Election Commission, 613 F.2d 864, 880 (D.C. Cir. 1979); United States v. Anile, 352 F. Supp. 14 (N.D. W.Va. 1973); State v. Williams, 249 S.E.2d 759 (W. Va. 1978); People v. Tenneny, 417 N.Y.S.2d 840 (1979); Little Rock Police Department v. One 1977 Lincoln Continental, 580 S.W.2d 451 (Ark. 1979); Seuss v. State, 370 So.2d 1203 (Fla. App. 1978); Doescher v. State, 578 S.W.2d 385 (Tex. Crim. App. 1979).

Due to ambiguous language in the state court's opinion, Mr. Callaway perceives two possible bases for a finding of consent: (1) the failure to proffer an immediately accessible driver; (2) the relinquishment of the keys. The

first basis hardly seems appropriate to a consent analysis. Whether or not another driver was at hand was entirely beyond Mr. Callaway's control and was beyond his ability to "consent." Mr. Callaway did not "freely waive" his opportunity to avoid impoundment because he did not "freely waive" the opportunity to provide another driver, which depended on fortuitous circumstances out of Mr. Callaway's hands.

Additionally, there is no showing that the police gave Mr. Callaway any time to secure another driver. According to officer Quick, Mr. Callaway did not know anyone able to take custody "at that time," which certainly did not foreclose the possibility someone could be available in the near future.

Taken to its logical conclusion, this "holding"[5/] in Callaway would permit seizure of any vehicle, on consent grounds, where the driver is arrested and no one is present on the scene to take control of the car. Moreover,

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5/ The decision is sufficiently ambiguous that it is difficult to state with certainty that this basis is a holding.

this "holding" violates the well-settled rule relating to mere acquiescence.

The police demand to provide another driver or suffer impoundment was a claim of colorable authority that they indeed possessed the right of seizure. Without such a right, Mr. Callaway's failure to supply another driver could not have contributed to the police authority to seize. Thus, the analysis must ultimately focus on the right the police had to the car which as argued above was unsupportable.

As to the second possible basis for finding consent, the surrendering of the car keys is also but a classic example of mere acquiescence. The record is undisputed that at the point of relinquishment, the police were going to seize the car regardless of whether Mr. Callaway turned over the keys. If he had not turned over the keys, the car would have been towed to the impoundment lot at his expense.

Thus, the police were going to take the car in any event, under a claim of colorable authority. Mr. Callaway's alleged "consent" was

vitiated if the claim was invalid, which it was for reasons discussed at length above.

Consent should be found only after the facts are inspected "with the most careful scrutiny." Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973). The Wisconsin Supreme Court did not fulfill that mission. Mr. Callaway was never led to believe he had any choice in the matter. Quite the contrary: he was told in no uncertain terms the car would be seized. His only choice was as to the means of effectuating the seizure. Compare Dunaway v. New York, 442 U.S. 200, 207, n. 6 (1979) (request to come to police station may easily carry implication of obligation and amount to seizure of person); contrast, United States v. Mendenhall, 446 U.S. 544 (1980) (lead opinion: citizen consented to accompany officers who "was simply asked if she would accompany" them). Mr. Callaway was not simply asked if he would, or wanted, to give up his car. He was told he had to.

II. THE DECISION HEREIN ALSO CREATES A SERIOUS CONFLICT IN NEED OF RESOLUTION AS TO WHETHER AN INVENTORY SEARCH OF AN IMPOUNDED VEHICLE MUST BE CONDITIONED ON CONSENT OF A PRESENT OWNER OR USER - AN ISSUE LEFT OPEN BY THIS COURT IN OPPERMAN.

Once an automobile is lawfully impounded, it may be subjected to highly intensive, probing scrutiny, according to the Wisconsin Supreme Court: "[I]n view of the recognized purposes served by inventory we conclude that the better-reasoned cased authorize police inventory searches of locked and unlocked automobile trunks, glove compartments, and other compartments of a vehicle in which the owner might reasonably be expected to put personal effects or items of value." State v. Prober, 98 Wis.2d 345, 354, 297 N.W.2d 1, 6 (1980), indicating in an accompanying footnote, id., n. 6, that "other compartments" includes console and dashboard compartments and ash trays, but not fluid reservoirs or structural cavities unlikely to hold personal effects.

In the present case, the court relied on both Prober and Opperman to sanction the noncon-

sensual search of Mr. Callaway's locked glove compartment.[6] 106 Wis.2d at 515-518, 317 N.W.2d at 434-436. The court thus squarely rejected Mr. Callaway's contention - which is raised anew here -that where the owner of the impounded vehicle is present, an inventory search must be conditioned on his/her consent.[7]

Opperman does not lend necessary support to the Callaway-Prober holding, because in Opperman the owner was not present at the time of impoundment. Accordingly, this Court was not squarely faced with the present issue (which is another reason to grant certiorari). As Justice Powell's concurring opinion states, "the search

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[6] The police never asked Mr. Callaway for permission to conduct the inventory search; nor indeed did they even tell him a search was imminent.

[7] Mr. Callaway does not, of course, suggest there are identical limitations on a search when the police have probable cause to associate the car or its contents with criminal activity or some public hazard.

here was limited to an inventory of the unoccupied automobile." 428 U.S. at 380. See also Search and Seizure, § 7.4(a), pp. 570-571, stressing that the Opperman dissenters clearly favored a requirement of pre-inventory consent where the owner was accessible and that the plurality opinion was in no necessary disagreement.

The eighth circuit has also explained the inapplicability of Opperman to the present circumstance:

> [I]n Opperman, the Court noted that the car's owner "was not present to make other arrangements for the safekeeping of his belongings" and that the "inventory itself was prompted by the presence in plain view of a number of valuables inside the car." United States v. Opperman, supra, 428 U.S. at 375-76, 96 S.Ct. at 3100. Here, by contrast, the police offered no special justification for the search and Wilson was present during the search and capable of making other arrangements to safeguard his property. The police could have protected their interests as well as Wilson's without intruding into the privacy of the auto-mobile trunk. The police, for example, could have asked for Wilson's consent to search the car, or, in the alternative, requested that Wilson arrange to remove the car himself or to relieve police from liability for claims.

United States v. Wilson, 636 F.2d 1161, 1165 (8th Cir. 1980). Accord, State v. Mangold, 82

N.J. 575, 414 A.2d 1312, 1318 (1980) ("The absence of the vehicle owner was an express consideration in the Opperman court's assessment of the reasonableness of the inventory in that case").

The West Virginia Supreme Court has also held that Opperman is strictly limited to its facts, that is that the driver was not present at the time of impoundment to make arrangements for the car and belongings. Goff, 272 S.E.2d at 460. This court should resolve the conflict created by the broad extension of Opperman in Callaway.

As La Fave declares, id., "there is much to be said in favor of the proposition that the police should inventory the impounded vehicle when the owner or possessor is at hand only if he elects that alternative." Accord, State v. Mangold, 82 N.J. 575, 414 A.2d 1312 (1980); Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979); State v. Kilcrease, 379 So.2d 737 (La. 1980); United States v. Wilson, 636 F.2d 1161, 1165-1166 (8th Cir. 1980; State v. Sawyer, 571

P.2d 1131 (Mont. 1977). Other commentators unreservedly support this idea as well. Moylan, The Inventory Search of an Automobile: A Willing Suspension of Disbelief, 5 Univ. Balt. L.R. 203, 218 (1976); Comment, Chimel v. California: A Potential Roadblock to Vehicle Searches, 17 U.C.L.A. L.R. 626, 641 (1970).

The primary purpose of an inventory search is for the owner's benefit (i.e., protection of property while in police custody). Miller v. State, 403 So.2d 1307, 1311 Fla. 1981). There is no reason to deprive an arrestee of the right to waive a benefit purportedly for his/her benefit: "It would be anomalous to justify a search of an automobile to be for the owner's benefit, when the owner is available but does not consent to the search. Surely the property owner is an adequate judge of the treatment of the property that would benefit him." Sawyer, 571 P.2d at 1134. Accord, Moylan, 5 Univ. Balt. L.R. at 219 ("The failure to consult the wishes of the individual concerned makes a mockery of the claim that the search is in the interest of protecting personal property").

The other two policy arguments in favor of nonconsensual inventories (false claims and danger to the public) are equally meritless. The possibility of a false claim is eradicated if the police secure a waiver of liability as an alternative to a search. E.g., State v. Hatfield, 364 So.2d 578 (La. 1978) (this purported justification is "very hollow" if a driver is willing to forego protection of inventory search); Mangold, 414 A.2d at 1318 ("Absent consent. ... the vehicle owner or user will be presumed to have assumed the risk for any claims of property loss or theft arising from the impoundment").

Moreover, an inventory search will not prohibit someone from claiming that the inventory report itself was falsified. Boulet v. State, 17 Ariz. App. 64, 495 P.2d 504, 508-509 (1972). Further as the dissent states, "The majority cites no cases holding the police liable under such circumstances. Indeed, several courts have viewed this theory of liability with skepticism." 106 Wis.2d at 539; 317 N.W.2d at 446, cites omitted.

As to the final policy ground, there is absolutely no evidence in this record that the car or its contents presented a danger to the police or the public.

No court has yet held that there can be no privacy interest in a motor vehicle. Yet, that is the practical effect of Callaway. The Wisconsin Supreme Court made no attempt to even pay lip service to the existence of some privacy interest, no matter how limited it might be. After Callaway, a car can be seized without necessity or justification, and it can be searched virtually down to the wheel wells without particularized need. This court should apply its brakes to the unlimited application of police intrusion sanctioned by the Wisconsin Supreme Court .

> In short, an automobile is a constitutionally protected area in which the owner has a rightful expectation of privacy against unwarranted intrusion. An intrusion thrust upon him without his consent and sometimes against his express wishes in the guise of doing him a favor is, in most of its applications, an epic hypocrisy and is flagrantly unconstitutional.

Moylan, 5 U. Balt. L.R. at 220.

III. REVIEW IS NECESSARY TO DETERMINE WHETHER THE SCOPE OF AN INVENTORY SEARCH PROPERLY EXTENDS TO A LOCKED GLOVE COMPARTMENT.

The Opperman vehicle's glove compartment was unlocked, and its entry was prompted by valuables in plain view inside the car. Mr. Callaway's glove compartment, on the other hand, was locked.

There is no reason why the locked compartment could not simply have been inventoried as a unit. The eighth circuit has held that "unit inventories might better serve the interests of the Government by minimizing 'the possibility of loss and the possibility of false claims against police by the owner.' ... As long as the police could show the trunk was never open while in their custody, the owner would have no claim involving property in the trunk." Wilson, 636 F.2d at 1165-1166.

The justification for intrusion into the locked compartment was that it was the likely repository of highly personal items. 106 Wis.2d at 517; 317 N.W.2d at 436. That is precisely why the compartment was deserving of fourth

amendment protection. Cf. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981), cert. granted ___ U.S. ___ (1981) (lawful seizure of car did not give police authority to conduct warrantless search of either closed paper bag or zippered pouch). The analysis must focus on whether the container is a common repository for personal effects inevitably associated with the expectation of privacy. Id., 655 F.2d at 1173 (dissent), citing Arkansas v. Sanders, 442 U.S. 753, 762 (1979).

A locked compartment is no less a container for personal effects that a pouch or suitcase. It should have been inventoried as a unit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari and review the lower court ruling.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

No. October Term, 1982

DENNIS CALLAWAY,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

STATE OF WISCONSIN

COURT OF APPEALS

State of Wisconsin v. Dennis Callaway

103 Wis.2d 389, 308 N.W.2d 897 (Ct. App. 1981)

* * * *

SCOTT, J. The State appeals from an order suppressing physical evidence, marijuana, seized in a warrantless inventory search of the locked glove compartment of a car driven by Dennis Callaway. The State argues that Callaway is not entitled to challenge the search because he failed to show that he had a legitimate expectation of privacy in the car. The State points out that a certificate of title shows a third person to be the owner of the car. The State further argues that the trial court erred in concluding that police impoundment of the car and their subsequent search of the locked glove compartment was unreasonable. We conclude that by failing to raise in the trial court the factual issue of whether Callaway had a legiti-

mate expectation of privacy in the search area, the State has waived its right to argue on appeal that Callaway had no such expectation. Further, we uphold the trial court's conclusion that the impoundment was unreasonable. Accordingly we affirm the suppression order.

On May 4, 1979, the State filed a complaint charging that Callaway possessed a controlled substance with intent to deliver contrary to sec. 161.41(1m)(b), Stats., and that he was a repeater contrary to sec. 939.62(1)(b), Stats. After a preliminary hearing on September 26, and October 22, Callaway was bound over for trial. On October 23, the State filed an information charging that Callaway violated secs. 161.41(1m)(b) and 939.62(1)(b), Stats.

On January 24, 1980, Callaway filed a motion to suppress all evidence seized from the car on the ground that the search and seizure violated his rights under the United States and Wisconsin constitutions. A hearing was held on April 21.

The facts are undisputed. Early on May 3, 1979, Michael Quick, a police officer for the City of West Bend, was advised of an outstanding traffic warrant for the arrest of Dennis Callaway. While he was operating a marked police car on Main Street at about 7:13 p.m. on that date, Quick observed the driver of a passing car to be Callaway. He recognized Callaway from a previous traffic stop. He radioed for assistance in making the arrest.

Quick stopped Callaway on Main Street just south of the intersection of Main and Franklin in front of a car wash. Parking was not permitted where Callaway stopped but parking was permitted until 2:00 a.m. on Main Street just north of Franklin.

As Quick walked up to Callaway's car, he observed a "bong" on the rear of the backseat. Quick told Callaway of the outstanding traffic warrant and said that Callaway would have to post a $51 bond or be taken to the sheriff's department. Callaway said he had no money with him. Quick said he would have to place Callaway

in custody and transport him to the sheriff's department. Quick told Callaway that pursuant to department policy, "a vehicle that was in an area such as that and we were transporting the owner of the vehicle to the Sheriff's Department, if there was not an operator that we could contact to come and get the vehicle, we would have to impound if for safekeeping." Quick did not provide Callaway the option of driving the car to the nearby parking zone. Callaway stated he did not know who could get the car at that time. Quick then told Callaway he could choose whether to have an officer drive the vehicle to the impounding lot or whether to pay a towing firm to tow the car to the lot. Callaway stated he preferred to have an officer drive it and gave Quick the keys. Quick did not search the car and did not seize the "bong." Officer Lieven came within ten or fifteen minutes and, using the keys, drove the car about a block to the police department garage. Officers Quick and Petitte drove Callaway to the sheriff's department.

Philip Lentz, another West Bend police officer, took possession of the car at the police garage at about 7:30 p.m. and conducted a complete inventory on it. The inventory followed the department's normal procedures and lasted between a quarter and one-half hour. He filled out a motor vehicle inventory form as he conducted the inventory. He found, among other things, a large "bong" in a corner of the backseat and a plastic bag containing a vegetable substance in the glove compartment. He opened the glove compartment by using the keys, and he took the vegetable matter to a detective's office for testing. Pursuant to department policy, when a vehicle is brought in by an officer with the keys, the keys are not returned to the owner but are tagged and kept in an office for safekeeping. Lentz was aware of items having been stolen from impounded vehicles during his years with the West Bend Police Department. He had completed hundreds of car inventory searches. When he had the key to a locked glove compartment, he would open the com-

partment, but when he did not have the key, he would not open a locked compartment.

Over the State's objection, Callaway introduced into evidence a certified copy of a State of Wisconsin Certificate of Title showing a certain Michael Walsh to be the owner of the car driven by Callaway.

The search was not pursuant to a search warrant.

On May 20, 1980, the trial court issued a written decision granting the motion to suppress. The court found that at time Callaway was apprehended, he had been stopped by the police on a city street in a no parking zone approximately twenty feet from a place where Callaway could have legally parked. The court concluded "that the taking of the defendant's car, the impounding of it, under the circumstances in this case was not reasonable." The court further concluded that the search of the locked glove compartment was unreasonable because police examination of the contents of a closed suitcase or other container in an inven-

tory search was held unreasonable in State v. McDougal, 68 Wis.2d 399, 228 N.W.2d 671 (1975).

On June 9, the court entered an order suppressing the admission of the marijuana into evidence. The State presently appeals from this order.

LEGITIMATE EXPECTATION OF PRIVACY

The State argues that Callaway does not have standing to challenge the search of the car because he was required to show but failed to show that he had a legitimate expectation of privacy in the car. The State is in no position to make this argument.

The test for determining whether a defendant is entitled to challenge the legality of a search and seizure under the fourth amendment is whether the defendant could legitimately expect privacy in the area which was the subject of the search. Rakas v. Illinois, 439 U.S. 128, 149 (1978). The anaylsis belongs more properly under the heading of substantive fourth amendment doctrine than under the heading of standing. Id. at 140.

In Rakas, the defendants were passengers in a car driven by the car's owner. The police stopped the car, searched it and found a rifle under the seat and shells in the glove compartment. The defendants were tried and convicted of armed robbery. The rifle and shells were admitted into evidence at trial. The defendants' motion to suppress the items as products of an illegal search was denied on the ground that the defendants lacked standing to object to the legality of the search. The United States Supreme Court affirmed and stated:

> Jones v. United States, 362 U.S. 257 (1960) and Katz v. United States, 389 U.S. 347 (1967), involved significantly different factual circumstances. Jones not only had permission to use the apartment of his friend, but had a key to the apartment with which he admitted himself on the day of the search and kept possessions in the apartment. Except with respect to his friend, Jones had complete dominion and control over the apartment and could exclude others from it. Likewise in Katz, the defendant occupied the telephone booth, shut the door behind him to exclude all others and paid the toll, which "entitled [him] to assume that the words he utter[ed] into the mouthpiece [would] not be broadcast to the world." Id., at 352. Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest. No such showing was made by these petitioners

with respect to those portions of the automobile which were searched and from which incriminating evidence was seized.

III

The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by tne Fourth and Fourteenth Amendments to the United States Constitution. Since it did not violate any rights of these petitioners, their judgment of conviction is affirmed. [Footnotes omitted.]

Id. at 149-50.

In United States v. Salvucci, 448 U.S. 83 (1980), the Supreme Court made it clear that the legitimate expectation of privacy test set forth in Rakas applied to cases involving crimes of possession. In so doing, the court expressly overruled the doctrine set forth in Jones v. United States, 362 U.S. 257 (1960), which had given a defendant charged with a crime of possession "automatic standing" to challenge the legality of a search which produced the evidence against him. In Salvucci, the Court stated:

While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, see Rakas, supra, 439 U.S., at 144, n. 12, property rights are

> neither the beginning nor the end of this Court's inquiry. In Rakas, this Court held that an illegal search only violates the rights of those who have "a legitimate expectation of privacy in the invaded place." Rakas, Id at 140. See also Mancusi v. DeForte, [392 U.S. 364 (1968)].
>
> We simply decline to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched.

Id. at 91-92.

In the present case, the record shows that the State did not present to the trial court the factual issue of whether Callaway had a legitimate expectation of privacy in the car he was driving.[1] Indeed, when Callaway attempted to introduce a copy of the car's certificate of title into evidence to show the car's owner to be a third person, the assistant district attorney protested:

> I object to it; it is irrelevant, Your Honor, as to who the registered owner of the vehicle would be. That may have some probative weight at trial to shed some doubt on the State's proof, but at a motion to suppress such as this, it is not really in issue. Who the owner of the vehicle may be has nothing to do with who may be the possessor of certain items found in that vehicle.

Accordingly, the State cannot now reverse course and argue that Callaway was required to prove but failed to prove that he had a legitimate expectation of privacy in the car.[2]

REASONABLENESS OF IMPOUNDMENT

The State argues that the trial court erred when it concluded that the impoundment of the car was unreasonable under the circumstances of this case. We disagree.

> The Fourth Amendment to the United States Constitution provides:
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> Art. I, sec. 11, of the Wisconsin Constitution is substantially the same. Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 499 (1958). [Footnote omitted.]

State v. Prober, 98 Wis.2d 345, 351, 297 N.W.2d 1, 5 (1980).

One of the exception to the warrant requirement is the right of the police to conduct

a warrantless inventory search of a lawfully impounded vehicle pursuant to standard police procedures which are not a pretext for concealing an investigatory motive. South Dakota v. Opperman, 428 U.S. 364, 375–76 (1976).[3] Our supreme court has held that both the federal and the state constitutions require the scope of such inventory search to be reasonable and to not include the examination of closed suitcases and containers found in the vehicle. State v. McDougal, 68 Wis.2d 399, 412–14, 228 N.W.2d 671, 678 (1975). But the scope of the search may include locked and unlocked automobile trunks, glove compartments and other compartments of a vehicle in which the owner might reasonably be expected to put personal effects or items of value. Prober, 98 Wis.2d at 353–55, 297 N.W.2d at 6–7.

For the first time in this state, we are presented with the question of what constitutes a lawful impoundment as a condition precedent to a warrantless inventory search.

[T]here has been a substantial and growing minority of jurisdictions which have insisted upon a factual showing of substantial police need, in the light of the constitutional regard for the privacy interests of automobile drivers, before approving the impoundment of a motor vehicle. Mozzetti v. Superior Court of Sacramento County, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84 (S.Ct. 1971); People v. Miller, 7 Cal.3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (S.Ct. 1972); State v. Boster, 217 Kan. 618, 539 P.2d 294 (S.Ct. 1975); State v. Singleton, 9 Wash. App. 327, 511 P.2d 1396 (Ct. App. 1973); State v. Hardman, 17 Wash. App. 910, 567 P.2d 238 (Ct. App. 1977); Granville v. State, 348 So.2d 641 (Fla. Dis. Ct. App. 1977); State v. Goodrich, 256 N.W.2d 506 (Minn. S.Ct. 1977); State v. McCranie, 137 Ga. App. 369, 223 S.E.2d 765 (Ct. App. 1976); City of Danville v. Dawson, 528 S.W.2d 687 (Ky. Ct. App. 1975); Duncan v. State, 281 Md. 247, 378 A.2d 1108, 1116 (Ct. App. 1977); Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (Ct. Sp. App. 1974); State v. Jewell, 338 So.2d 633 (La. Sup. Ct. 1976); United States v. Pannell, 256 A.2d 925 (D.C. Ct. App. 1969). Federal decisions in general accord are United States v. Lawson, 487 F.2d 468 (8 Cir. 1973); United States v. Edwards, 554 F.2d 1331 (5 Cir. 1977); United States v. Hellman, 556 F.2d 442 (9 Cir. 1977). See also, State v. McDaniel, 156 N.J. Super. 347, 383 A.2d 1174 (App. Div. 1978), State v. Slockbower, 79 N.J. 1, 8-9, 297 A.2d 1050, 1053 (1979)[4]

We hold consistent with the courts in other jurisdictions, that a vehicle is lawfully impounded under the United States and Wisconsin constitutions if the owner or driver gives his or her informed consent or if there is shown to

be a reasonable police need to impound the vehicle. The Washingon Court of Appeals provides some examples of when there may be a reasonable police need to impound:

> "Reasonable cause for impoundment may for example, include the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute which provides therefore as in the case of forfeiture."

State v. Bales, 15 Wash. App. 834, 835-36, 552 P.2d 688, 689 (1976) (quoting State v. Singleton, 9 Wash. App. 327, 332-33, 511 P.2d 1396, 1399-1400 (1973). We agree with the following statement of the New Jersey Supreme Court:

> It has been persuasively stated in a number of cases, in seeking a rationale that would duly balance the right of privacy against legitimate police safekeeping functions, that if the circumstances, that bring a vehicle properly to the attention of the

> police are such that its driver, even though arrested, is able to make his own arrangements for its custody, or if the vehicle can be conveniently parked and locked without constituting an obstruction of traffic or other public danger, the police should permit that action to be taken rather than impound it against the will of the driver and thereafter search it routinely.

Slockbower, 79 N.J. at 9, 297 A.2d at 1053-54).

The State has the burden of showing that a case falls within an exception to the constitutional rule prohibiting warrantless searches. Bies v. State, 76 Wis.2d 457, 463 251 N.W.2d 461, 464 (1977). The State thus has the burden of showing that a vehicle has been lawfully impounded before it can rely on the inventory search exception.

On review of an order suppressing evidence, the findings of fact, if any, of the trial court will be sustained unless against the great weight and clear preponderance of the evidence. Id. at 469, 251 N.W.2d at 467. This court will, however, independently examine the circumstances of the case to determine whether the constitutional requirement of reasonableness is satisfied. Id.

In the present case, the State argues that the policy of the West Bend Police Department to impound every vehicle which is parked in a prohibited zone and whose driver is taken into custody and cannot arrange at that time for someone to pick it up is reasonable. The State argues that not allowing an arrested person to re-enter a car helps promote public safety and protect law enforcement officers. This is the only argument advanced by the State in support of the impoundment of the Callaway vehicle. We are not convinced.

The State does not explain why the arresting officer who drove the vehicle to the police department garage could not have driven it twenty feet to a legal parking zone. Driving the car twenty feet is clearly easier than driving it to the sheriff's department.

The State has failed to show that there was a reasonable police need for impounding the Callaway car. The State has not shown that the car was abandoned or endangering public safety or that impoundment was necessary to preserve

evidence. Further, the State has not shown that the police impounded the car pursuant to a statute or ordinance or that Callaway consented to the impoundment. We must conclude that the State has not met its burden. We agree with the trial court that the impoundment was unreasonable under the circumstances of this case.

Because we have concluded that the car was unlawfully impounded, we need not consider the State's argument that the trial court erred when it ruled that the search of the locked glove compartment was unreasonable. We point out, however, that the trial court made its ruling before the Wisconsin Supreme Court decision in Prober.

By the Court.——Order affirmed.

FOOTNOTES

1 The only justification advanced by the State for its failure to raise the issue in the trial court is a statement in its brief that at the time of the suppression hearing, "the decision in Jones [regarding automatic standing] was in effect and the state may have believed that it could not challenge the defendant's standing." The United States Supreme Court rejected the same argument in Steagald v. United States, 101 S. Ct. 1642 (1981).

In Steagald, the Court was presented with the issue of whether a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant. The federal district court and the federal court of appeals ruled that a search warrant was not necessary. On writ of certiorari, the United States Supreme Court reversed, despite the government's argument that the defendant lacked an expectation of privacy in the searched house. The Court noted that the government had not made this argument to the lower ocurts and concluded that the government "through its assertions, concessions and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." Id. at 1647. The Court stated:

The Government asserts that it was unable to raise this issue in the courts below because both courts had acted before this Court decided United States v. Salvucci, 448 U.S. 83 (1980). We do not find this justification to be compelling. Under the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), any person charged with a possessory offense could challenge the search in which the incriminating evidence was obtained. Salvucci overruled Jones and instead limited such Fourth Amendment claims to those persons who had a reasonable expectation of privacy in the area of object of the search. Although Salvucci thus altered Fourth Amendment jurisprudence to some extent, the

rationale of that decision was in large part simply an extension of this Court's earlier reasoning in Rakas v. Illinois, 439 U.S. 128 (1978). The Rakas decision held that an illegal search violated the Fourth Amendment rights only of those persons who had a "legitimate expectation of privacy in the invaded place." Id., at 140. While that decision did not directly address the "automatic standing" rule of Jones v. United States, it was clearly an ill omen for the continued vitality of that decision. Since Rakas was decided well before this case was briefed and argued in the Court of Appeals, the Goverment could easily have raised before that court the question of whether petitioner's Fourth Amendment rights were even implicated by the search at issue here. Indeed, the Goverment in Salvucci clearly recognized the significance of Rakas, for in that case, despite the contrary authority of Jones v. United States, it argued from the outset that the defendant lacked a sufficient expectation of privacy to challenge the legality of the search under the Fourth Amendment. We are given no explanation why the Government failed to regard Rakas as of equal significance to this case.

Id. at 1646, n. 5.

Rakas was decided long before the time of the suppression hearing in the present case. The State could have easily argued in that hearing that Callaway had no legitimate expectation of privacy in the searched car. The fact that Salvucci had not yet been decided did not prevent prosecutors in another state from arguing in a suppression hearing that defendants charged with a possessory offense had no legitimate expectation of privacy in the searched place. See State v. Guy, 298 N.W.2d 45 (Minn. 1980).

2 We note that it has not been decided whether a defendant charged with possessory offense still has automatic standing in Wisconsin to challenge a search in which incriminating evidence is obtained. Although Salvucci rejected the doctrine of automatic standing as a

matter of federal constitutional law, it is clear that the State of Wisconsin could adhere to the doctrine as a means of affording greater protection to persons within its boundaries under art. I, §11 of the Wisconsin Constitution. State v. Doe, 78 Wis.2d 161, 171, 154 N.W.2d 210, 215.

3 In Opperman, the lawfulness of the impoundment was not in issue. Opperman's car was parked in violation of a local ordinance which prohibited parking in certain areas between 2:00 a.m. and 6:00 a.m. His car was ticketed at 3:00 a.m. and again at 10:00 a.m.

4 Since Slockbower was decided, the list of jurisdictions has grown. Drinkard v. State, 584 S.W.2d 650 (Tenn. 1979); State v. Peterson, 583 S.W.2d 277 (Mo. App. 1979); State v. Phifer, 250 S.E.2d 309 (N.C. App. 1979); Benavides v. State, 600 S.W.2d 809 (Tex. Crim. App. 1980); People v. Seigel, 95 Mich. App. 594, 291 N.W.2d 134 (1980).

APPENDIX B

STATE OF WISCONSIN

SUPREME COURT

State of Wisconsin v. Dennis Callaway

106 Wis.2d 503, 317 N.W.2d 428 (1982)

* * * *

COFFEY, J. This is a review of a decision of the court of appeals affirming an order of the circuit court for Washington county, Hon. J. TOM MERRIAM, presiding, granting a motion to suppress. The defendant, Dennis Callaway, filed a motion to suppress the physical evidence (marijuana) seized in a warrantless inventory search of an automobile. The trial court, after an evidentiary hearing, found that both the impoundment of the vehicle and the subsequent inventory search of the car, including the glove compartment, were unreasonable and, thus, violative of Callaway's fourth amendment rights. The appellate court affirmed, agreeing with the trial court that the impounding of the

automobile was unreasonable and further holding that the state had waived any right to raise the issue of Callaway's standing to challenge the constitutionality of the search by failing to raise the issue in the trial court.

The testimony presented at the hearing on defendant's motion to suppress recites that on May 3, 1979, at approximately 7:15 p.m., West Bend Police Officer Michael Quick stopped a vehicle driven by Dennis Callaway, the defendant-respondent[1] in the city of West Bend. Officer Quick, recognizing Callaway, ordered him to pull his vehicle over to the curb because of an outstanding traffic warrant. At that point of Callaway's arrest, parking was not allowed, although street-side parking was permitted by ordinance up until 2:00 a.m. some 20 feet from the position where Callaway was stopped.

Officer Quick walked up to the car and advised Callaway of the outstanding traffic warrant and that he would have to post $51 or be taken into custody. While approaching Callaway's vehicle, Officer Quick observed a "bong"[2]

on the back seat of the automobile. During interrogation at the scene, Callaway stated that he did not have any money on him. Officer Quick then placed Callaway under arrest and told him that he would be transported to the Washington County sheriff's department.

Patrolman Quick next informed Callaway that, pursuant to a police department policy, he had three alternatives to choose from regarding the removal of the car from the scene of the arrest. The three alternatives were: that the police would contact a person of Callaway's choice to remove the vehicle from the street; a tow truck would be called to transport the vehicle to the impoundment lot; or a police officer would drive the vehicle to the impoundment lot, thus saving Callaway towing charges. Callaway stated that he knew of no one he could contact at this time to remove the vehicle from the street. Callaway told Officer Quick that he preferred having an officer drive the vehicle to the police department and gave Quick the keys. Officer Quick radioed for assistance and shortly

thereafter, another West Bend police officer arrived and drove the car to the West Bend police department where it was inventoried. Patrolman Quick transported Callaway to the Washington county sheriff's department.

Pursuant to the standard police department procedures, a third police officer conducted a complete inventory of the contents of the car, including the glove compartment, at the police garage. The inventorying officer testified that the department inventory procedure is for "the protection of the owner of the vehicle as well as the police department and the community as a wnole." The police officer filled out a standard motor vehicle content inventory form as he conducted the inventory.

After the general car inventory was completed, the officer used one of the defendant's keys to unlock the glove compartment. The officer testified that it was the policy of the West Bend police department to inventory the contents of the entire car, including a locked glove compartment, if a key was furnished.

Inside the glove compartment, the inventorying officer found a clear plastic bag containing a vegetable substance which was subsequently tested and determined to be marijuana. Based upon this evidence, Callaway was charged with possession of a controlled substance with intent to deliver, contary to sec. 161.41(1m)(b), Stats., and as a repeater, contrary to sec. 939.62(1)(b), because of a prior conviction for delivery of a controlled substance, contrary to sec. 161.41(1)(b). After a preliminary hearing, Callaway was bound over for trial.

Prior to trial, Callaway filed a motion to suppress the evidence seized during the automobile search, alleging that the inventory search of the car, including the glove compartment, was in violation of his constitutional rights. After an evidentiary hearing and the submission of briefs, the trial court granted the motion to suppress, finding that the impounding of the automobile and the inventory search of the car, including the glove compartment, were unreasonable. The state appealed this finding and

order, pursuant to sec. 974.05(1(d)2, Stats.

The appellate court affirmed the order holding that the impounding of the car was unreasonable under the facts of the case and that the state waived any objection it had to the defendant's standing to challenge the constitutionality of the impoundment and inventory search of the car, including the glove compartment, because that issue was not raised in the trial court.

ISSUE

Was the impounding and subsequent inventory search of the automobile, including the glove compartment, unreasonable under the facts and circumstances of this case and, thus, violative of the defendant's fourth amendment protection against unreasonable searches and seizures?

The fourth amendment protection against unreasonable searches and seizures is applicable to the states through Mapp v. Ohio, 367 U.S. 643, 655 (1961). The fourth amendment protects the rights of people to be secure from

unreasonable searches and seizures as follows:

"The Fourth Amendment to the United States Constitution provides:

> "'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'
>
> "Art. I, sec. 11, of the Wisconsin Constitution is substantially the same. Warrantless searches 'are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions are 'jealously and carefully drawn.' Jones v. United States, 357 U.S. 493, 499 (1958)." State v. Prober, 98 Wis.2d 345, 351, 299 N.W.2d 1 (1980).

It is well-established that automobile inventory searches are "searches" within the meaning of the fourth amendment and, therefore, subject to the reasonableness standard of that amendment.

> "We conclude that the latter line of cases not only compels the conclusion that an inventory search is a 'search,' but also represents the better reasoned approach. An inventory search can be a serious intrusion into the private affairs of the individual. Cases holding that such conduct is not a search limit their inquiry to the question of

whether the search is a bona fide inventory. Cases taking the opposite view consider that question, but also concern themselves with the 'reasonableness' of the intrusion, i.e., once it is established that it is not improper to conduct an inventory, the question becomes whether the manner in which the inventory is conducted, its scope, is reasonable. We believe the severity of the intrusion and its possibility for abuse requires this double-barreled protection." State v. McDougal, 68 Wis.2d 399, 409, 410, 228 N.W.2d 671 (1975). See also: South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976).

In determining whether an automobile search is reasonable, both this court and the United States Supreme Court have consistently drawn a distinction between automobiles and other areas protected by the fourth amendment. The rationale for this distinction is discussed in the following quotation:

"This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment. Although automobiles are 'effects' and thus within reach of the Fourth Amendment, Cady v. Dombrowski, 413 U.S. 433, 439 (1973), warrantless examinations of autombiles have been upheld in circumstances in which a search of a home or office would not. Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Cady v. Dombrowski, supra, at 439-440; Chambers v. Maroney, 399 U.S. 42, 48 (1970).

"The reason for this well-settled distinction is twofold. First, the inherent mobility of automobiles creates circumstances of

such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. Carroll v. United States, 267 U.S. 132, 153-154 (1925); Coolidge v. New Hampshire, 403 U.S. 443, 459-460 (1971). But the Court has also upheld warrantless searches where no immediate danger was presented that the car would be removed from the jurisdiction. Chambers v. Maroney, supra, at 51-52; Cooper v. California, 386 U.S. 58 (1967). Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly non-criminal in nature. Cady v. Dombrowski, supra, at 442. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise are noted, or if headlights or other safety equipment are not in proper working order.

"The expectation of privacy as to automobiles is further diminished by the obviously public nature of automobile travel. Only two Terms ago, the Court noted:

"'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.... It travels public thoroughfares where both its occupants and its contents are in plain view.' Cardwell v. Lewis, supra, at 490.

"In the interests of public safety and as part of what the Court has called 'community caretaking functions,' Cady v. Dombrowski, supra, at 144, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." South Dakota v. Opperman, supra at 367, 368, 369. See also: Thompson v. State, 83 Wis.2d 134, 141, 265 N.W.2d 467 (1978).

It is also settled that a police inventory search is among the few exceptions to the warrant requirement of the fourth amendment.

"The search of the automobile was without a warrant. The defendant contends the search was unreasonable and does not fall within any of the recognized exceptions to the constitutional warrant requirement. Some of the exceptions are consent to search, search incident to arrest, a probable cause search, an exigent circumstance search, a police inventory search, and an automobile exception to warrantless search." Thompson v. State, 83 Wis.2d 134, 139, 265 N.W.2d 467 (1978). (Emphasis supplied.)

Thus, it is clear that the relevant standard to be applied to the search and seizure

in this case is whether the search was reasonable. This court has recognized that there are two aspects of the question of reasonableness to be considered in determining the constitutionality of an inventory search.

> "As we view the problem, there are essentially two aspects to the question of reasonableness. First, whether the intrusion was reasonable in the first instance, and second, whether the scope of the intrusion is reasonable. We consider here whether the scope of the search was reasonable, assuming the inventory search itself was justified." State v. McDougal, supra at 410.

In this case, challenges have been made to both the reasonableness of the impounding of the vehicle and the reasonableness of the search of the car, including the locked glove compartment. The challenge to the reasonableness of the impoundment relates to the first of the two aspects of the question of reasonableness set forth in McDougal, supra, extending to the glove compartment. First, we address the question of the reasonableness of the impoundment.

The consideration of what constitutes a reasonable and lawful impoundment of a vehicle as a condition precedent to a warrantless inven-

tory search is a question of first impression in this state. In Bies v. State, 76 Wis.2d 457, 251 N.W.2d 461 (1977), we held that this court will independently examine the circumstances of the case to determine whether the constitutional requirement of reasonableness is met, even though in this case, the court of appeals and the trial court concluded that the impounding of the vehicle driven by Callaway was unreasonable.

> "on review of an order suppressing evidence, the findings of fact, if any, of the trial court will be sustained unless against the great weight and preponderance of the evidence. State v. Pires, supra, 55 Wis.2d 602, 603. However, this court will independently examine the circumstances of the case to determine whether the constitutional requirement of reasonableness is satisfied." Bies v. State, Id. at 469.

Whether a search and seizure is unreasonable and, therefore, constitutionally invalid depends upon the facts and circumstances of the particular case.

> "The determination of what conduct amounts to an unreasonable search and seizure depends upon the particular facts of each case." State v. McDougal, supra at 410. See also: South Dakota v. Opperman, supra at 375.

In the case at bar, Officer Quick ordered Callaway to pull over to the curb because of an

outstanding traffic warrant. The officer promptly informed Callaway that he would have to post $51 for the outstanding traffic warrant or he would be taken into custody and transported to the sheriff's department. Had Callaway been able to post the $51, he would only have had to proceed to the police station to pay the $51 and then he would have been free to leave.

Since Callaway was unable to post the $51, it was necessary to convey him to the sheriff's department. At this time, Officer Quick informed Callaway that he had three alternatives to choose from in removing the car from the street. These alternatives were that the police would contact another operator to come and remove the vehicle from the street; the car would be towed to the impoundment lot; or an officer would drive the car to the lot. According to the testimony of Officer Quick, this written policy of the West Bend police department was consistently applied to all vehicle operators taken into custody.

Callaway stated that he did not know of anyone who could come to get the car at that time and, therefore, he freely waived his opportunity to avoid the impoundment. Officer Quick then informed Callaway that he had a choice of having the car towed to the station or allowing another officer to drive the car to the station. Callaway chose to have an officer drive the car and voluntarily surrendered the car keys, including the key to the locked trunk and glove compartment, to the officer.

The defendant argues that the impounding of the vehicle was unreasonable because the car could have been moved a mere 20 feet to a spot where parking was permitted up until 2 a.m., pursuant to a city ordinance. This argument presumes, however, that Callaway would have been released from the custody of the sheriff's department before 2 a.m. Although the defendant argues that Callaway would more than likely be released by that time, the officers could not assume as much. Inasmuch as Callaway did not know of anyone whom he could contact to remove

the car and further, since he could not personally post the $51, it is reasonable to assume that the car would have remained on the street illegally parked after 2 a.m.

We also note that if the car had been left unattended on the street, there is more than a possibility that it could have been vandalized or struck by another vehicle in which case it is not unlikely that the owner would claim that the police department was negligent in some manner. It is not unreasonable for the police to avoid such claims by removing the vehicle and placing it in protective custody.

In analyzing the question of what constituted a lawful impoundment as a condition precedent to a warrantless inventory search, the court of appeals concluded that based upon the decisions of several other courts, a vehicle is lawfully impounded if the owner or driver gives his or her informed consent or if there is shown to be a reasonable police need to impound the vehicle. See: State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979), and cases summarized

therein. Applying this standard to the facts of this case, the court of appeals concluded that the impoundment in the case at bar was not lawful. We reject this conclusion of the court of appeals, however, and hold that the facts of this case satisfy that standard as Callaway was informed that the car would be impounded if he could not suggest another driver the police could contact and he consented to the impoundment of the vehicle and voluntarily surrendered his keys to the officer.

We note that several of the cases analyzed by the court of appeals are factually distinguishable from the case at bar and our decision in this case is not necessarily inconsistent with them. For example, in State v. Bales, 15 Wash. App. 834, 552 P.2d 688 (1976), the impoundment was found unconstitutional because the defendant indicated that a friend could arrive in a short time to pick up the car and, thus, the impounding of the car was unnecessary. Similarly, in State v. Goodrich, 256 N.W.2d 506 (Minn. 1977), the defendant arranged to have his

brother pick up the car. In Granville v. State, 348 So.2d 641 (Fla. App. 1977), the car could have been left where it was parked in a friend's driveway and in People v. Miller, 7 Cal.3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972) the defendant expressly stated that he preferred to assume the risk of leaving his property in the car.

In light of the fact that Callaway was given the three alternatives for the removal of the automobile, the fact that the car was illegally parked at the spot where it was pulled over, and the fact that after a thorough search of the record, we find no indication that the impoundment was a mere pretext for searching the car and the defendant has not argued as much to this court, we hold that the impoundment of Callaway's car was reasonable and, thus, it not violative of the fourth amendment prohibition against unreasonable searches and seizures.

We now discuss the question of the reasonableness of the inventory search made of the car, including the locked glove compartment,

since we have concluded the impounding of the vehicle was necessary and reasonable because of the need to protect the vehicle from damage, theft or vandalsim and because Callaway was given three alternatives for the removal of the illegally parked car. Although the trial court found that the inventory search was unreasonable, based upon the decision of this court in State v. McDougal, supra, the court of appeals failed to address this issue because of its determination that the impoundment was unreasonable in the first instance. We note that the trial court decision was rendered prior to the decision of this court in State v. Prober, supra.

In Prober, as in the case at bar, this court was faced with the question of the constitutionality of a police inventory search. In Prober, we expressly recognized that the scope of an otherwise valid inventory search is limited by the purpose for which it is undertaken.

"However, as we pointed out in McDougal, law enforcement officers may not 'engage in

> an unlimited search under the guise of a police inventory search.' State v. McDougal, supra, at 413. This recognized the benign, non-investigatory nature of inventory searches and the impropriety of engaging in an investigative search of a vehicle under the 'pretext' of inventorying its contents." Id. at 352.

We cited the following language from the United States Supreme Court decision in South Dakota v. Opperman, supra, as descriptive of the purposes underlying an inventory search:

> "'When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobiles' contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody, . . .; the protection of the police against claims or disputes over lost or stolen property, . . .; and the protection of the police from potential danger.'" Id. at 369.

Considering these purposes underlying an inventory search and the reasonableness standard of the fourth amendment, we concluded that the search of an automobile trunk was within the permissible scope of an inventory search. State v. Prober, supra, at 352. In reaching this conclusion, we stated that our reasoning would also be equally applicable to glove compartments.

"We are aware that legal authority is to be found both approving and disapproving trunk inventory searches, but in view of the recognized purposes served by the inventory searches, we conclude that the better-reasoned cases authorize police inventory searches of locked and unlocked automobile trunks, glove compartments, and other compartments of a vehicle in which the owner might reasonably be expected to put personal effects or items of value." (Emphasis supplied.) Id. at 353, 354.

The reasons underlying our determination that the search of a trunk or glove compartment was within the permissible scope of an inventory search were fully set forth in Prober:

"To exclude these kinds of compartments from the scope of the inventory searches would clearly thwart the first stated objective of protecting the property itself while it is in custody. It is a meritless argument to say that the owner of the car was satisfied with the security offered by these compartments because the storage of a vehicle at a police storage yard for an indeterminate length of time was not likely to be the sort of circumstances the owner had in mind in storing valuables in the car. Even more clearly the second purpose for these searches, protection of the police against claims of loss is not served if police do not inventory the entire contents of the vehicle. Police cannot reasonably be expected to defend against claims of loss, whether legitimate or false, reasonable or unreasonable, if they are not permitted to catalog what they took into custody. Moreover, a car owner inclined to make a false claim could be expected to base the claim on property missing from an area the police were not per-

> mitted to search. Finally, the third purpose, protection of the police from potential danger, can only be served by allowing police to inventory the contents of automobile trunks and other compartments. Whether the potential danger is a weapon which, if stolen, could pose a serious safety threat, explosives or even a leaking spare gasoline container threatening to ignite the vehicle, it can be averted only by permitting police to discover these before the potential harm materializes." Id. at 354-355.

This reasoning as applied to the case at bar is supported by the testimony of the police officer who inventoried the car. Based upon hundreds of inventory searches conducted by the officer, he testified that glove compartments of automobiles frequently are the repository for valuable items such as "checkbooks, bankbooks, personal documents, information on the motor vehicle, et cetera." Additionally, we point out that glove compartments often serve as a place for storing credit cards. Such credit cards are becoming a necessary hazard of life in our plastic society, although significant financial loss can result from the theft and use of the cards by an unauthorized person.

Further our determination that the inventory search of a car, including the glove com-

partment, is reasonable is supported by the testimony at the hearing establishing that there have been many prior reports of items being stolen from motor vehicle stored in the West Bend impoundment lot. Although the impoundment lot is secured by a fence, the area is open during the daylight hours and, even though secured at night, frequent acts of vandalism and theft have taken place in the lot after dark in spite of the barbed wire fence. Because of tnese instances of prior thefts at the impoundment lot, the inventory search was both reasonable and necessary to protect both the owner's property and the police from claims of lost property. The protection of the owner's property and the protection of police from claims of lost or stolen property are two of the justifications for inventory searchs set out in South Dakota v. Opperman, supra, and the testimony in this case clearly demonstrates that those contents are actual.

Our decision in Prober is consistent with the reasoning of the United States Supreme Court

in South Dakota v. Opperman, supra, in which that court recognized that a search of glove compartments is within the scope of a reasonable inventory search as it is a customary place for documents of ownership and registration besides being a place where valuable are often stored:

> "These cases have recognized that standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration, United States v. Pennington, supra, at 251, as well as a place for the temporary storage of valuables." Id. at 372.

Similarly, our decision in the case at bar is in harmony with the rationale of the Opperman decision in which the United States Supreme Court reached the conclusion that car inventories pursuant to standard police procedures are reasonable since the search in the case at bar was conducted according to the West Bend police department standard inventory procedure.

> "The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." Id. at 372.

Thus, after review of the decisions of the United States Supreme Court and the facts of

this case, we find no reason to modify our decision in Prober and consistent therewith, we hold that the inventory search of the car, including the glove compartment, was within the permissible scope of an inventory search.

In light of our holding that both the impoundment and the subsequent inventory search of the car driven by Callaway were reasonable and constitutionally valid, we reverse the decision of the court of appeals and the order of the trial court.

When we granted the petition to review in this case, we requested that the parties brief the issues discussed above as well as the issue of whether this court should follow the lead of the United States Supreme Court in abandoning the doctrine of automatic standing. Since the parties to this case have fully briefed the additional question of whether Wisconsin should retain the rule of "automatic standing," we deem it appropriate to resolve that issue at this time.

This court, following the United States Supreme Court's holding in Jones v. United States, 362 U.S. 257 (1960), establishing a rule of "automatic standing" permitting a defendant charged with a crime of possession to challenge the legality of a search that produced evidence against him regardless of whether his own fourth amendment rights had been violated by that search and seizure, applied the automatic-standing rule in Wisconsin. See: State v. Monanan, 76 Wis.2d 387, 251 N.W.2d 421 (1977); State v. Mabra, 61 Wis.2d 613, 213 N.W.2d 545 (1974), and State v. Christel, 61 Wis.2d 143, 211 N.W.2d 801 (1973). These cases followed Jones and their holdings were grounded in federal law concerning the fourth amendment protections, absent any analysis of state constitutional law.

Recently, the United States Supreme Court, in the decision of United States v. Salvucci, 448 U.S. 83 (1980), expressly abolished the rule of automatic standing established in Jones and held that the justifications for that rule have

been eliminated in subsequent decisions.

We are fully cognizant, on the other hand, that this court has the prerogative to afford greater protection under our Wisconsin constitution than the United States Supreme Court has declared under the federal constitution. State v. Doe, 78 Wis.2d 161, 171, 172, 254 N.W.2d 210 (1977).

In considering and weighing the arguments presented by both those in favor of and those in opposition to the rule of automatic standing, we do not feel it is advisable to continue our adherence to the rule granting automatic standing to one charged with the crime of possession. In so doing, we agree with and endorse the reasoning of the United States Supreme Court set forth in United States v. Salvucci, supra, and hold that the criminal defendants charged with crimes of possession must first prove that their own constitutional rights have been infringed upon by a search or seizure before they can challenge the constitutionality of that search and/or seizure. The relevant question to be

answered in making this determination is whether the defendant had a legitimate expectation of privacy in the place searched.

> "[T]he Fourth Amendment rights are personal rights which may not be asserted by another. Id. at 133. The inquiry as to whether these personal rights were violated 'requires a determination of whether the disputed search and seizure has infringed on an interest of the defendant which the Fourth Amendment was designed to protect.' Id. at 140. In making this determination, the relevant question to be answered is whether the defendant had a legitimate expectation of privacy in the invaded place." State v. Fillyaw, 104 Wis.2d 700, 710, 312 N.W.2d 795 (1981).

By the Court—The decision of the court of appeals is reversed and remanded for further proceedings not inconsistent with this opinion.

FOOTNOTES

1 It is not established in the record who was the actual owner of this vehicle although the defendant's attorney entered a certificate of title into evidence at the motion to suppress hearing identifying someone other than Callaway as the owner of the car. The defendant implied in his argument that at the time of his arrest he was in the process of purchasing the car from the person to whom the car was registered.

2 A bong is a special type of pipe used in the smoking of marijuana.

SHIRLEY S. ABRAHAMSON, J. (dissenting). The defendant was stopped by a police officer in the city of West Bend because of an outstanding unpaid traffic warrant in the amount of $51. No crime was involved.[1] The state must prove, as the majority acknowledges, that both the impoundment of the car and the inventory search without a warrant were reasonable. Exceptions to the requirement that a warrant is needed for a search or seizure are jealously and carefully drawn. Terry v. Ohio, 392 U.S. 1, 27 (1968); Prober v. State, 98 Wis.2d 345, 351, 297 N.W.2d 1 (1980); Bies v. State, 76 Wis.2d 457, 463, 251 N.W.2d 461 (1977).

I conclude, as did the circuit court and the court of appeals, that the impoundment of the defendant's car was unreasonable. I further conclude, as did the court of appeals, that the inventory search of the impounded car was unreasonable. I would therefore affirm the decision of the court of appeals affirming the circuit court's suppression order.

IMPOUNDMENT. The burden is on the state to present sufficient evidence to show the reasonableness of the impoundment (the seizure of the automobile). Because any exception to the warrant requirement must be narrowly drawn to fit the justification of the exception, the first circumstance to be examined is the reason the police came into contact with the defendant's venicle. There are at least six reasons that a vehicle may come into the custody of the police: seizure for forfeiture; seizure for evidentiary purposes; seizure to protect a prisoner's property; traffic or parking seizures; seizure of abandoned vehicles; and other non-criminal seizures. See sec. VII, Model Rules for Law Enforcement, Searches, Seizures and Inventories, Ariz. State U. College of Law and Police Foundation (1974) (hereinafter referred to as Model Rule for Law Enforcement).

In the case at bar the police took custody of the defendant's car because the defendant happened to be in a car when he was arrested on an offense unrelated to that car and unrelated

to his driving at the time of arrest. The police's contact with the defendant's car was a seizure to protect a prisoner's property and is part of what the United States Supreme Court has described as the police's "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S. 433, 441 (1973). See also South Dakota v. Opperman, 428 U.S. 364, 368 (1974).

In exercising this caretaking function the police impound a car for three principal reasons: to protect the public good, namely to remove the car from an area because it is a traffic hazard or nuisance; to protect the private citizen, namely to safeguard the vehicle and its contents; and to insulate the police from liability in the event of a false claim of loss. Hence impoundment of the defendant's car in the instant case is reasonable if it can be justified on the basis of these three purposes of the caretaking function.

The state asserts that policy of the West Bend police of offering the arrested person the choice of having someone remove the car forthwith or having the car impounded renders the impoundment reasonable, even though other reasonable alternatives which were less intrusive invasions of the defendant's privacy were also available. The state summarizes its position as follows: "Although the state agrees that moving the car would also be a reasonable alternative, it does not believe that failing to do so constituted an unreasonable and unconstitutional impoundment." State brief at 32.

I agree with the majority that the state's position should not be adopted. That the officer follows police policy helps protect the impoundment from being challenged as a pretext for an investigatory search[2] but does not relieve this court of its obligation of determining whether the policy meets constitutional standards. "unconstitutional searches cannot be constitutionalized by standardizing them as part of normal police practices." State v.

Jewell, 338 So.2d 633, 640 (La. 1976).

The majority holds that this court will "independently examine the circumstances of the case to determine whether the constitutional requirement of reasonableness is met. . . ." Supra, p. 511. The majority then goes on to state that, "[w]hether a search and seizure is unreasonable and, therefore, constitutionally invalid depends upon the facts and circumstances of the particular case." Supra, p. 511. My disagreement with the majority relates to the majority's analysis of the facts and circumstances of the case at bar.

The majority recognizes that if the defendant's car could have been parked safely and lawfully within close proximity to the place of arrest, the impoundment would be reasonable. State v. Bales, 15 Wash. App. 834, 552 P.2d 688, 690 (1976). The majority concludes, however, that there was no legal parking place nearby. I disagree.

At the time of defendant's arrest, the car was stopped in a "no parking zone." The record

shows that the car could have been lawfully parked a few feet from where the defendant was arrested. The spot became an "illegal" parking spot from 2 a.m. to 6 a.m. The majority, without any basis in the record, leaps to the conclusion that the nearby parking spot was not "legal" because it was reasonable to believe that the defendant would be unable to move his car before 2 a.m. If we are going to speculate, it is more reasonable to hypothesize that because the defendant was arrested on a traffic warrant, he would be incarcerated for less than six hours or that he could have called someone to pick up the car within six hours. Finally, had the police run a simple check on the title to the car, they would have discovered the car did not belong to the defendant and could have called the owner to have the car removed. In any event, Officer Quick testified that even if there was a legal parking place to leave the car, the department's policy was to impound the car unless another operator was available to drive the car away.

In addition, the majority ignores the simple fact that the 2 a.m. to 6 a.m. parking violation with which it is concerned had not yet occurred and that even if it did eventually occur, impoundment might not be the appropriate remedy for the violation. According to the photographs in the record, the legal-later-to-become-illegal parking spot was not marked as a tow-away zone. In South Dakota v. Opperman, 428 U.S. 364, 365, (1976), the ordinance involved provided that the vehicles may be towed. See 2 La Fave, Search and Seizure sec. 7.3(c), 559 (violation of parking regulation which does not create a hazard does not inevitably call for impoundment of the offending vehicle).[3]

Furthermore the state failed to negate as an alternative to impoundment the availability of a lawful all-night parking spot closer to the place of defendant's arrest than the police were going to drive defendant's car. Moving the car to a lawful parking area instead of impounding the car comports with public policy as established by the legislature.[4]

Nor does the state negate as an alternative to impoundment the possibility of allowing the defendant to have the car towed by a towing company to a private lot or to his home. The officer gave the defendant the opportunity to have the car towed by a towing company only to the police station.

The majority relies heavily on South Dakota v. Opperman and State v. Prober as precedents to justify the reasonableness of the impoundment. This reliance is misplaced. The facts justifying impoundment in those cases are significantly different from the facts of this case. In Opperman the police impounded a car which had been illegally parked and had multiple tickets. The court viewed the impoundment as necessary for public safety and convenience. In addition, as the court carefully pointed out, the owner "was not present to make other arrangements for the safekeeping of his belongings." 428 U.S. 364, 375 (1976). In Prober, the motel operator claimed the car was wrongfully parked on the motel's private property; the motel operator

asked the police to remove the car; and the incoherent owner could not be relied upon to make other arrangements for the car. Thus Opperman and Prober do not support the holding of the majority that it is lawful to impound a car when the defendant is available to make alternative arrangements for his property.

I do not mean to suggest that the police department must operate a car delivery service of defendants' cars. I would not place a burden on the police to exhaust every possible alternative before the police impounds the vehicle. Nor would I place the burden solely on the person arrested to offer the police officer alternatives to impoundment. But if impoundment is to protect the citizen, the police and the public, then measures short of impoundment which are less costly for the police department, which are less intrusive to the citizen, and which are readily available should be used. Where the delivery of an auto to a legal parking spot or to the defendant's home is less onerous than having the vehicle brought to the station, that

alternative should be offered to the arrested person.

An increasing number of courts require the police to take the initiative with respect to suggesting alternative dispositions of the car to the traffic offender and require the police to comply with a reasonable, lawful, disposition which the offender proposes. See cases cited in New Jersey v. Slockbower, 79 N.J. 1, 9-12, 397 A.2d1050 (1979).[5] I would follow Slockbower and the Florida Court of Appeals and hold that "[t]he individual in custody should be advised of and given the choice of leaving the car in its location, contacting someone else to take charge of the car or having it impounded. An individual who is taken into custody ought not have his vehicle impounded, inventoried and towed away under such circumstances where alternative steps can be taken to secure the vehicle and the individual is willing to accept the responsibility for the safekeeping of the contents of such vehicle." (Emphasis in original.) State v. Jenkins, 319 So.2d 91, 94 (Fla. App. 1975),

quoted with approval, Session, III v. State, 353 So.2d 854, 855 (Fla. App. 1977).[6]

It is very possible that the state could have proven in this case that the impoundment was justified because there were no reasonable alternatives to impoundment. But the state did not offer such proof, and I therefore conclude on the basis of this record that the impoundment was unreasonable.

Although I am not willing to accept the state's argument that the officer's compliance with the police regulation in the case at bar renders the search reasonable, I would like to comment further about police department regulations.

On the basis of this record, I am not as confident as the majority as to what the West Bend police regulations are or that the officer was following departmental regulations. The officer testified that the West Bend Police Department had written regulations governing impoundment. The regulations were not read into the record or attached as an exhibit. The

police officer's testimony at the preliminary hearing as to the department's regulations differs from his testimony at the suppression hearing.[7] It is therefore difficult to tell from the record just what the West Bend police regulations were, whether the officer knew them and whether the officer followed them.

I am convinced that police departments should establish written procedures to govern impounding and inventorying of cars. Police officers impound and inventory cars frequently, and the police officer's discretion and conduct should be guided and controlled by policy determinations made by the police department itself. Police department rulemaking has the advantage of producing rules stated clearly by the police themselves in non-legalese, understandable to police and citizens alike. I believe police rulemaking will in all probability enhance the quality of police decisions, protect the privacy of citizens and the interests of the public, and facilitate the work of the judicial system.[8]

Professor Amsterdam urges that the United States Supreme Court adopt the following rule for determining the constitutionality of police searches and seizures: (1) Unless the search or seizure is conducted pursuant to and in conformity with a statute or police departmental rule, it is unreasonable; (2) the statute or departmental rule must be reasonably particular in describing the circumstances under which the search and seizure should be made and in describing the nature of the search and seizure; and (3) the statute or departmental rules must conform to constitutional requirements.[9] This suggestion might have merit in interpreting our state constitutional protections against unreasonable search and seizure.

There are some who say that the drafting and adoption of such rules by police departments is not possible. They are wrong. Just one example that such rules are possible is the Model Rules for Law Enforcement, Searches, Seizures and Inventories of Motor Vehicles, drafted by the project on Law Enforcement Policy

and Rulemaking supported by the Police Foundation. These Model Rules appear to have been adapted and adopted by several police departments.[10] The Model Rules set forth a set of procedures for several kinds of seizures and inventory searches. The Model Rule which would have been applicable to this case provides as follows:

"Rule 603. PRISONER'S PROPERTY.

"A. Definition. When a person is arrested in or around a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as prisoner's property.

"B. Disposition of Prisoner's Property. A prisoner shall be advised that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to make his request in writing.

If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

"C. Initial Procedure with Respect to Prisoner's Property. If a vehicle classified as prisoner's property is not taken into police custody, it shall not be inventoried. If it is necessary to take a prisoner's

property vehicle into police custody, the vehicle should be taken to a police facility or a location in front of or near a police facility. Immediately upon arrival at a police facility, if the vehicle is not locked, the arresting officer shall remove from the passenger compartment all containers—such as boxes or suitcases—and any other personal property which can readily be seen from outside the vehicle and which reasonably has a value in excess of $25. After removing any such property, the officer shall, if possible, roll up the windows and lock the doors and trunk. Any property so removed shall be brought into the police facility and appropriate entries and returns made. Containers shall not be opened [at this time]; however, they may be sealed to insure the security of their contents. No other inventory or search of the vehicle shall be made at this time.

"D. Procedure After 24 Hours. If, within 24 hours of the time that the prisoner was arrested, a person authorized by the prisoner (or the prisoner himself, if released) does not claim a vehicle which was classified as prisoner's property and taken to a police facility, a complete inventory of its contents shall be made under Rule 607." 11

The West Bend regulation, as best we can understand it from this record, in contrast to the Model Rules, does not describe with any particularity the circumstances justifying impoundment and offers little protection to the citizen's privacy. For this reason I cannot accept the state's position that the police officer's following police policy renders the search reasonable.

INVENTORY SEARCH. Even if it can be said the police took lawful custody of the vehicle in the first instance, lawful custody of an impounded vehicle does not of itself satisfy the constitutional requirement of reasonablenss in regard to the search of such vehicle. In testing the reasonableness of the inventory of the locked glove compartment, we must remember that this case involves the "benign non-investigatory" inventory of the car of a person arrested on a minor noncriminal offense. The case does not present the question whether any other exception to the warrant requirement applies. The court is not asked whether the search of the locked glove compartment is valid as a search for which consent was granted, as a search incident, as a probable cause search, or as a search under exigent circumstances. Thompson v. State, 83 Wis.2d 399, 409, 228 N.W.2d 671 (1975). That the police are looking for nothing in particular and everything in general does not establish the constitutionality of the search. This kind of random police search is the precise invasion of

privacy which the fourth amendment was intended to prohibit. Mozetti v. Superior Court, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84, 92 (1971) quoted with approval in State v. McDougal, 68 Wis.2d at 407.

Despite the plethora of words written that privacy in autos is less important than in other areas such as in the home, no court has said that there is no expectation of privacy in an automobile. Each of us does have an expectation of privacy in our car. Indeed the majority's description of the usual contents of a glove compartment makes clear that the locked glove compartment functions as a mobile safety box for many people.

An inventory search, like any exception to the warrant requirement, must extend no further than the exigency that fostered the creation of the exception. As the court said in State v. McDougal, 68 Wis.2d 399, 410, 228 N.W.2d 671 (1975), what is required to determine if the inventory search is reasonable "is a balancing of the state's need to search and the individual's

right to be free from intrusion." See also State v. Prober, 98 Wis.2d 345, 356, 297 N.W.2d 1 (1980).[12]

The basis for allowing a warrantless inventory search is to allow the state to respond to three distinct needs: "the protection of the police from potential danger . . . the protection of the owner's property while it remains in police custody . . . and the protection of the police against claims or disputes over lost or stolen property. . . ." South Dakota v. Opperman, 428 U.S. 364, 369 (1976). See also Thompson v. State, 83 Wis.2d 134, 140, 265 N.W.2d 467 (1978). None of these objectives suffices to justify the inventory search in the case at bar.

First, there is no claim in this case that the inventory was performed to protect the police from potential danger.[13]

Second, the inventory cannot be justified as a reasonable measure to protect the owner's valuables inside the locked glove compartment of the impounded car. While protecting the

contents for the benefit of the owner has merit where the vehicle is abandoned or the owner or other authorized person cannot for one reason or other cope with the question of safeguarding any valuables in the car, the justification has little if any merit where, as in this case, the owner or authorized driver is present and can be questioned about valuable items and possible arrangements for their disposition. As the Montana Supreme Court stated, "It would be anomalous to justify a search of an automobile to be for the owner's benefit, when the owner is available but does not consent to the search. Surely the property owner is an adequate judge of the treatment of the property that would most benefit him." State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977). In the circumstances of this case, an inventory search of a locked glove compartment should not have been undertaken without giving the defendant the opportunity to decide whether he prefers the safety of the inventory or the privacy of no inventory. See State v. Killcrease, 379 So.2d 737 (La. 1980); State v.

Marigold, 82 N.J. 575, 414 A.2d 1312 (1980); Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979).[14]

Third, the search cannot be justified as a reasonable measure to protect the police against false claims of lost or stolen property. This court addressed this issue in State v. McDougal, 68 Wis.2d 399, 413, 228 N.W.2d 671 (1975), saying that it had "no doubt that false claims of loss of property have been made against police officers; however the incidence of such claims (none have reached this court) is not such that we should countenance unreasonable invasions of the privacy of others. The police can take reasonable steps to conduct a police inventory to protect themselves against false claims but not unreasonable ones." Further, if the owner has been consulted, as suggested above, and prohibits the search, the risk of loss of any valuables in the car is on the owner, not the police.

I must say that I find the majority opinion's emphasis on the inventory as needed to

protect the police from tort liability somewhat disingenuous. The police run at least as much a risk of tort liability as a result of driving or towing the car to the police department as in failing to inventory. Nevertheless the police move the vehicles, and no one worries about tort claims. Furthermore, the manner in which the inventory was performed in this case probably encourages rather than discourages false claims. A single officer drove the car to the station. Another officer conducted the inventory alone. The owner can easily assert that an item was stolen prior to the inventory or was intentionally omitted from the police records.

Finally, the thesis that the police would be liable for damage to or property taken from a car impounded under the circumstnaces of this case if the car were left at a fenced impoundment lot with the windows and doors locked appears to be without any legal foundation. The majority cites no cases holding the police liable under such circumstances. Indeed, several courts have viewed this theory of

liability with skepticism. See, e.g., United States v. Lawson, 487 F.2d 468, 475 n. 9 (8th Cir. 1973); Mozzetti v. Superior Court, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84, 88-91 (1971); State v. Opperman, 228 N.W.2d 152, 159 (S.D. 1975); State v. Hardman, 17 Wash. App. 910, 567 P.2d 238, 241-42 (1977); State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977).

My conclusion that the inventory of the locked glove compartment under the circumstances of this case unreasonable comports with Opperman and Prober, the cases upon which the majority places so much reliance. Neither of these cases purports to speak to the question of an inventory search when the owner is available. In both cases, as the opinions take pains to emphasize, the owner was either physically or "mentally" not available to make arrangements for the safekeeping of his belongings.

The majority appears to read Opperman to say that once a car is lawfully impounded a full inventory search is permissible to protect the defendant's goods and to protect the police from

liability. As Professor La Fave explains, Opperman cannot be read this broadly.

> "Although a superficial reading of the plurality opinion in Opperman might prompt the conclusion that the Court has given the green light to virtually all police vehicle inventory procedures, this is not the case. The four Opperman dissenters quite clearly disagree with the plurality opinion on a multitude of points. Moreover, Justice Powell's cautious concurring opinion, in which he did not more than agree 'that the routine inventory search in this case is constitutional,' also reflects a deep and abiding concern about unrestrained inventories. Is is fair to say, therefore, that Opperman raises more questions than it answers and that the vehicle inventory procedures remain subject to challenge on a variety of grounds." 2 La Fave, Search and Seizure sec. 7.4, p. 570.

The majority reads Prober to say that whenever there is a valid impoundment, the inventory search can extend to the locked trunk and the locked glove compartment but not to a closed container in the locked trunk. This is too broad a reading of Prober. As stated previously, Prober involves an "unavailable" owner and a car illegally parked on private premises. In addition, although the Prober court spilled much ink discussing inventory search, it ultimately concluded that "the search of the defen-

dant's vehicle, including the trunk, can also be upheld as a probable cause search by virtue of the 'automobile exception' to the warrant requirement," 98 Wis.2d at 357.[15] Since the Prober court held that the police had probable cause to believe the auto contained evidence of a crime or contraband, I do not understand how the Prober court could have also held that the search was of "the benign, non-investigatory nature" required for a valid inventory search. State v. Prober, 98 Wis.2d 345, 351, 354-55, 297 N.W.2d 1 (1980) (Abrahamson, J. concurring without opinion). This confusion in the Prober opinion renders the opinion of dubious precedential value with respect to inventory searches.

In the case at bar the defendant was available to the police; when he was told of the impoundment he was not told there would be an inventory; he was not consulted as to the inventory being conducted, the scope of the inventory, or the disposition of his valuables; and his release from jail could be expected within a short time after arrest. Under these

circumstances, I conclude an inventory search of the locked glove compartment unreasonable.

AUTOMATIC STANDING. In brief, uninformative obiter dicta the majority disposes of the issue of "automatic standing." The discussion is dicta because the majority holds that the search and seizure were reasonable; the issue of the defendant's standing to challenge the search and seizure is therefore unnecessary to the holding of the case.[16]

Furthermore, it is unclear what the majority is doing in its discussion of automatic standing. While the majority cites United States v. Salvucci, 448 U.S. 83 (1980), in which the United States Supreme Court abandoned the doctrine of automatic standing as a federal constitutional doctrine, it is unclear whether the majority's abolition of the Jones automatic-standing rule in Wisconsin is a matter of interpretation of Art. I, sec. 11 of the Wisconsin Constitution (which is never cited in the opinion), federal constitutional law, state public policy, or what. See, Comment, The

Independent Application of State Constitutional Provisions to Questions of Criminal Procedure, 62 Marq. L. Rev. 596, 609-617 (1979). All the guidance the majority opinion provides comes in the conclusory comment that after weighing the arguments pro and con of "automatic standing," the majority does not "feel it is advisable to continue our adherence to the rule granting automatic standing to one charged with the crime of possession." Supra, p. 520.

The majority fails to consider the serious criticisms levied against Salvucci by the dissenters in Salvucci and the commentators and the unresolved question of whether the defendant's statements at the suppression hearing may be used to impeach him at trial. See 3 La Fave, Search and Seizure sec. 11.2, pp. 144-145 (Supp. 1982); Slobogin, Capacity to Contest a Search and Seizure: the Passing of Old Rules and Some Suggestions for New Ones, 18 Am. Cr. L. Rev. 387 (1981); Bradley, Havens, Jenkins and Salvucci, And the Defendant's "Right" to Testify, 18 Am. Cr. L. Rev. 419 (L981); The Supreme Court 1979

Term, 94 Harv. L. Rev. 77, 196-205 (1980). See also State v. Alston, 87 N.J. 531, 436 A.2d 81 (1981) refusing to follow Salvucci and adopting the automatic-standing rule.

It is unfortunate that without analysis the majority blindly follows the erratic course the United States Supreme Court has set in the field of search and seizure. The United States Supreme Court, in interpreting the federal constitution, sets minimum constitutional guarantees, the federal safety net. But the courts of this state and the law enforcement officers of this state should not be hampered by the vagaries of the United States Supreme Court decisions or the confusion and lack of consistency in the United States Supreme Court cases dealing with automobile searches. Our court should set forth as matter of state constitutional law or as a matter of the administration of criminal justice in this state clear, simple holdings which can be understood and followed by the police, district attorneys and the courts.

The framers of our state constitution relied on the state constitution bill of rights to protect Wisconsin citizens against state government, not on the federal bill of rights. Laasch v. State, 84 Wis.2d 587, 598-99, 267 N.W.2d 278 (1978) (Abrahamson, J. concurring).

The Supreme Court of the State of Wisconsin should—almost as a matter of routine—in cases where civil rights are involved, first examine the provisions of the Wisconsin Constitution. If the court concludes that the protection of rights can be based on the Wisconsin Constitution, the court should hold that the ratio decedendi is the independent state constitutional ground. Cases interpreting comparable federal constitutional provisions may be persuasive but are not necessarily binding in our interpretation of the state constitution. This methodology will eliminate the need of the Wisconsin Supreme Court to re-tailor its jurisprudence every time the United States Supreme Court shifts direction. The admonition of Justice Smith of the Wisconsin Supreme Court in

1855 in the case of The Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567, 785 (*567, *758) (1855), should guide this court today. Justice Smith said:

> "The people then made this constitution and adopted it as their primary law. The people of other states made for themselves respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe, and stand by ours."

The decision of the court today does not comport with this court's long-standing interpretation of sec. 11, Art. I of the state constitution.

For the reasons set forth, I dissent.

I am authorized to state that Justice NATHAN S. HEFFERNAN joins in this dissenting opinion.

1 A minimum of four and perhaps as many as six West Bend police officers tended to the defendant or his car. There are approximately 34 full-time and part-time officers in the West Bend Police Department. Assuming three shifts, not of equal numbers, I estimate 12 to 16 officers worked on the late afternoon-night shift. Thus one-fourth to one-third of the West Bend Police officers were apparently busy with the defendant or his car for some time between 7:15 and 8:15 p.m.

2 The majority claims that "after a thorough search of the record, we find no indication that the impoundment was a mere pretext for searching the car." I disagree. See the testimony quoted at note 7.

3 When the Texas Court of Criminal Appeals was faced with a situation similar to the one presented in this case, the Texas court found the state's position that impoundment was reasonable "without merit." The Texas court said: "[w]e cannot agree that a . . . seizure of an automobile [before the parking ordinance was violated] is permissible. Furthermore there was no testimony that it was standard procedure to impound a vehicle for this violation . . . . Also while the [defendant] himself may not have been able to attend to the vehicle he may have been able to instruct someone to do it for him." Benavides v. State, 600 S.W.2d 809, 812 (Tex. Cr. App. 1980).

4 Sec. 349.13(3), Stats. 1979-80, provides as follows:

"(3) Whenever any traffic officer finds a vehicle standing upon a highway in violation of a prohibition, limitation or restricting on stopping, standing or parking imposed under ch. 346 or this section, the traffic officer is authorized to move the vehicle or to require the operator in charge thereof to move the vehicle to a position where parking is permitted or to either private or public parking or storage premises. The removal may be performed by, or under the direction of, the traffic officer or

may be contracted for by local authorities. Any charges for removal shall be regulated by local ordinance. The operator or owner of the vehicle removed shall pay the reasonable charges for moving or towing or any storage involved based upon the ordinance."

Compare the practices of the West Bend police to the procedures set forth in sec. 4-306.4 of the City of Madison Police Department Manual of Policy, Regulations and Procedures which authorizes removal of cars violating traffic or parking regulations to a location on a public street as close as possible to the place of violation, consistent with prevailing traffic conditions:

"4-306.4 TRAFFIC OR PARKING REMOVALS

"Vehicles which are removed from a location on a public street pursuant to traffic or parking regulations shall be classified as 'traffic removals'. When an officer causes a vehicle to be moved pursuant to traffic regulations, the vehicle may be moved to a location on a public street as close to the original location as possible, consistent with prevailing traffic conditions. Vehicles removed shall not be inventoried or searched in any way. However, the officer who caused the vehicle to be removed shall, if possible, close the windows and lock the doors before he leaves the vehicle."

5 The majority, citing State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979), appears to justify the impoundment on the ground that Callaway gave informed consent to the impoundment. Supra, p. 513. Callaway did not consent to the impoundment. Since he did not have a friend to call to get the car, the car was going to be impounded. Callaway consented to have the police drive the car to the station at police expense rather than to have a private towing company drive the car to the police station at his expense. There is no basis in the record for concluding that Callaway consented to the impoundment. See testimony of officer quoted at note 7 below.

The Slockbower case does not support the majority's holding that the impoundment was reasonable. Slockbower is representative of a growing number of cases in which the court, before approving impoundment of a motor vehicle, insists on a factual showing of substantial police need. See also State v. Hardman, 17 Wash. App. 910, 567 P.2d 238, 240 (1977) (Impoundment of a citizen's vehicle following his or her arrest on a traffic charge is inappropriate when reasonable alternatives to impoundment exist.); Benavides v. State, 600 S.W.2d 809 (Tex. Cr. App. 1980); Session, III v. State, 353 So.2d 854 (Fla. App. 1977); State v. Bales, 15 Wash. App. 834, 558 P.2d 688 (1976). The Slockbower court said:

"It has been persuasively stated in a number of cases, in seeking a rationale that would duly balance the right of privacy against legitimate police safekeeping functions, that if the circumstances that bring a vehicle properly to the attention of the police are such that its driver, even though arrested, is able to make his own arrangements for its custody, or if the vehicle can be conveniently parked and locked without constituting an obstruction of traffic or other public danger, the police should permit that action to be taken rather than impound it against the will of the driver and thereafter search it routinely." 79 N.J. at 9.

6 Professor LaFave proposes the following requirements for an impoundment to be held reasonable:

"It is submitted that for an impoundment of an arrestee's vehicle to be reasonable under the Fourth Amendment, the arresting officer should be required (i) to advise the arrested operator 'that his vehicle will be taken to a police facility or private storage facility for safekeeping unless he directs the officer to dispose of it in some other lawful manner,' and (ii) to comply with any reasonable alternative disposition requested. Surely, the police should not be expected to undertake delivery of

the auto to some distant place or to make any other disposition which would be more onerous than having the vehicle brought to the station. But if the driver asks that his car be left at the scene, and the circumstances are such that it can be lawfully parked in the vicinity, then his wishes should be respected. Likewise, if the driver asks that his car be turned over to a passenger, this should be done of the passenger is not under arrest or otherwise incapacitated and displays a valid operator's license. And even if the car is brought to the station with the arrestee, he should be afforded a reasonable opportunity at the time of booking to arrange for a friend to pick up the car. Such alternative means of dispositon serve not only to protect the arrestee's possessory and privacy interests in the vehicle but also to relieve the police of continuing responsibility for the car and its contents, and thus are to be preferred over impoundment when one such alternative has been requested by a properly-advised arrestee and can reasonably be accomplished under the circumstances." (Notes omitted.) 2 La Fave Search and Seizure sec. 7.3, pp. 559-560 (1978).

7 At the preliminary examination, the officer described the stop and the impoundment as follows:

"Q. Why did you stop him [Callaway]? A. At briefing that day at 4:00, we had been advised of an outstanding warrant on the subject.

"Q. And did you have an occasion to take the Defendant into custody at the scene. A. Yes I did.

". . .

"Q. Did you have the occasion to call for assistance? A. I did call for assistance from Officer Petitti, as when I looked in the vehicle I did see a bong located on the right portion of the rear seat.

"Q. What is a bong sir? A. A glass object with water in it, used for smoking purposes.

"Q. What were you going to have done with the vehicle? A. Where I had stopped him is a no parking zone, and the Department does have a policy that all subjects taken into custody, we inventory the vehicle and impound it for safe keeping.

". . .

"Q. If it would have been a regular parking zone would you have pulled his car away? A. Yes sir.

"Q. You would have? A. Yes sir.

"Q. I thought you said it was a policy only where you had a no parking zone when you stopped a vehicle. A. No sir, I don't believe that's what I said.

"Q. All right why don't you tell me what you did say. A. I believe what I said is the vehicle was in a no parking zone and also our department has a policy of anybody we take into custody we do impound the vehicle and—

"Q. You do impound the vehicle at the police station? A. It's taken to the police department where it is inventoried and taken to the impoundment lot.

"Q. Did you ask the Defendant for the keys to this vehicle? A. That's right I indicated to him if we had the keys it would be easier, otherwise we'd call a tow truck, and he'd have to pay for it.

"Q. Did he give you the keys to the vehicle? A. Yes sir."

At the suppression hearing, the officer described the stop and the impoundment as follows:

"Q. Did you have any conversation with Dennis Callaway at that time regarding the vehicle? A. Yes, I did.

"Q. What was that? A. I advised him that it was our department policy, a vehicle that was in an area such as that and we were transporting the owner of the vehicle to the Sheriff's

Department, if there was not an operator that we could contact to come and get the vehicle, we would have to impound it for safekeeping.

"Q. Did you ask Mr. Callaway at that time whether he could provide an operator of that vehicle? A. Yes, I did.

"Q. Did you give him an opportunity to provide an operator? A. Yes.

"Q. What did he tell you, if anything? A. He did not know of any (sic) that would be able to operate it at that point.

"Q. Did you have any further conversation with Mr. Callaway regarding the vehicle at that time? A. I then advised him he could have his choice of either having an officer drive the vehicle to the impounding lot or pay the wrecker fee and could have a wrecker tow it to the lot.

"Q. What did he tell you? A. He would prefer us to drive it, and then gave us the keys to it.

"Q. Did he give you the keys to the vehicle? A. Yes.

"Q. After you obtained the keys to that vehicle, what happened? A. Officer Lieven then came to our location and operated the vehicle back to the Police Department garage.

"Q. And what did you do? A. I transported, along with Officer Pettite, Dennis Callaway to the Sheriff's Department.

". . .

"Q. OK. Now, in this particular case, there was no question that the person you stopped had the access to the keys? He, in fact, was driving the vehicle, isn't that right? Yes sir.

"Q. You never asked him, did you, whether or not he just wanted to pull his car into the parking zone which was 20 feet ahead of him? A. No, sir, I did not.

" . . .

"Q. . . . you explained the policies to Dennis as to the rights, that he could have the car towed away, or he could have it impounded? A. That's right.

"Q. And exactly what did you tell him? A. That he had the option of either having a tow truck tow it to our impoundment lot, or have our officer drive it to our impoundment lot, therefore saving the wrecker cost.

"Q. But, in either event, it was going to be impounded, is that right? A. Exactly.

"Q. You did not indicate to him that if the tow truck came it could take it to his residence or some other place? A. No, sir, that is not the way it works.

"Q. Now, Officer, did you, besides seeing that bong, you did not smell any marijuana or observe any marijuana, did you? A. No, sir.

"Q. And when you obtained the keys, did you tell him you needed the keys in order to take it to the police station? A. To operate the vehicle, yes."

8 For a discussion of the need for and desirability of rulemaking by the police department to govern police discretion, see Davis, Discretionary Justice (1969); Goldstein, Police Policy Formulation; A Proposal for Improving Police Performance, 65 Mich. L. Rev. 1123 (1967); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974); Wright, Beyond Discretionary Justice, 81 Yale L.J. 575 (1972); McGowan, Rulemaking and The Police, 70 Mich. L. Rev. 659 (1972); Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 Law & Contemps. Probs. 500 (1971); Remington, Review - Davis: Discretionary Justice: A Preliminary Inquiry, 36 U. Chi. L. Rev. 884 (1969); Remington, The Role of Police in a Democratic Society, 56 J. Crim. Law, Criminology & Police Science 361 (1965); A.B.A. Standards for Criminal Justice, Standards Relating to the Urban Police Function, Law Enforcement Policy-making, ch. 1, part IV (2d. ed. 1980).

9 Amsterdam, Perspectives of the Fourth Amendment, 58 Minn. L. Rev. 349, 416-17 (1974).

10 See, e.g., City of Madison Police Department Manual of Policy, Regulations and Procedures; District of Columbia Metropolitan Police Department General Order, Series 602, No. 1, quoted in Schwasta v. United States, 392 A.2d 1071, 1076 (D.C. Ct. App. 1978).

11 Sec. 4-306.3 of the Manual of Policy, Regulations and Procedures of the City of Madison Police Department, entitled "Prisoner's Property" sets forth the policy procedure in a case such as the one before us:

"A. Definition

"When a person is arrested in a vehicle which he owns or has been authorized to use, and the vehicle is not otherwise subject to seizure, it shall be classified as 'prisoner's property.'

"B. Disposition of Prisoner's Property

"The vehicle should be locked and legally parked on the street. If it is not possible to lock the vehicle, any observable items of value should be secured in the trunk of the vehicle. Of course, dependent upon the fact situation, guidelines contained in other subsections may apply. For example, where probable cause exists to believe the vehicle contains seizable items (4-303.3) or where probable cause to believe the vehicle has been stolen or used in a crime exists (4-306.2).

"If the vehicle is found to be the property of a person having no criminal involvement in the offense, such person shall be notified of the location of the vehicle as soon as practicable.

12 For a collection of cases on inventory searches, see Annot., Lawfulness of "inventory Search" of Motor Vehicle Impounded by Police, 48 A.L.R.3d 537 (1973).

13 If the police have probable cause to believe that there is a dangerous item in the car or there is contraband, these objects can be obtained by the police without reliance upon the power to inventory. The police can rely on the "automobile exception." 2 La Fave, Searches and Seizures sec. 7.4(a), p. 572 (1978); State v. Prober, 98 Wis.2d 345, 357-59, 297 N.W.2d 1 (1978).

14 In addition, as Professor La Fave has concluded, where the circumstances are such, as they were here, that the impoundment would be for a short time, locking up the car rather than inventorying it suffices to protect the owner and the police. 2 La Fave, Search and Seizure sec. 7.4(a), 574 (1978). See also Model Rules for Law Enforcement, Rule 603 (b) and Commentary, p. 64.

Another approach some courts have taken is that under circumstances such as in the case at bar the police may remove from the car and inventory only those valuables in plain view. See Schwasta v. United States, 392 A.2d 1071, 1076 (D.C. Ct. App. 1978). In South Dakota v. Opperman, the Court noted that the inventory was prompted by the presence in plain view of a number of valuables inside the car. 428 U.S. at 475-76. On remand from the United States Supreme Court the South Dakota Supreme Court held that as a matter of state constitutional law noninvestigative inventory searches "must be restricted to safeguarding those articles which are within plain view of the officer's vision." State v. Opperman, 247 N.W.2d 673, 675 (S.D. 1976). This position was also adopted by the Montana Supreme Court. State v. Sawyer, 571 P.2d 1131, 1134 (Mont. 1977).

15 For a discussion of the "automobile exception" and probable cause, see Chambers v. Maroney, 399 U.S. 42 (1970); Thompson v. State, 83 Wis.2d 134, 265 N.W.2d 467 (1978); and State v. McDougal, 68 Wis.2d 399, 228 N.W.2d 671 (1975) (compares an inventory search and a probable cause search to obtain evidence). See

also Cosgrove, Warrantless Container Searches Under the Automobile and Search Incident Exceptions, 9 Ford. Urban L.J. 185 (1980-81); Moylan, The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label, 27 Mercer L. Rev. 987 (1976).

16 In any event the defendant in this case need not rely on the automatic standing rule to challenge the search. It is clear from the record that the defendant has standing. The defendant was lawfully present in a vehicle which he was authorized to drive at the time of the stop. The defendant was the one against whom the search was directed. Although the defendant was not the owner of the car, the police officer testified he had seen the defendant driving the car previously, that he thought the defendant owned the car and that he did not know the defendant did not own the car. There is no contention here that the defendant claims the protection of the Fourth amendment as a result of the violation of the constitutional rights of another. These factors establish that the defendant had standing to challenge the validity of the search and seizure without resort to the "automatic standing" rule.

Also, the state did not raise the issue of standing at the trial court.

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CASE NO. 81-2280

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

DENNIS D. CALLAWAY,

PETITIONER,

V.

STATE OF WISCONSIN,

RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because the decision of the Wisconsin Supreme Court is in accord with previous decisions of this Court and is not in conflict with other state court decisions. This case does not raise issues which require resolution by this Court, or which are appropriate,

under the facts of this case, for review by this Court. The decision of the Wisconsin Supreme Court is correct and the result was fair.

There are no special and important reasons which warrant review in this case.

ARGUMENT

I. THIS CASE DOES NOT PRESENT SPECIAL AND IMPORTANT REASONS WHICH WOULD JUSTIFY CERTIORARI REVIEW BECAUSE THE CASE DOES NOT RAISE ISSUES WHICH NEED TO BE RESOLVED BY THIS COURT AND BECAUSE THE DECISION OF THE COURT BELOW IS CONSISTENT WITH OTHER DECISIONS BY THIS COURT AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS.

A. This Court need not accept this case in order to define what constitutes a lawful automobile impoundment for noninvestigatory purposes.

This case involves the narrow issue of whether a police impoundment and sub-

sequent inventory search of an automobile driven by petitioner after his arrest was reasonable and therefore constitutional.

Petitioner urges this Court to accept this case for review in order to define for the lower courts, prosecutors and police what constitutes a lawful impoundment as a prerequisite to a lawful inventory search. Respondent believes a decision by this Court on that specific question is not necessary to guide the lower courts. This Court's decision in South Dakota v. Opperman, 428 U.S. 364 (1976), provides sufficient guidance. The Court in Opperman did not specifically address the lawfulness of the impoundment. However, its discussion of the "community caretaking function" of the police, which allows them to take custody of vehicles for a

variety of reasons, sets forth the allowable parameters of impoundment:

> In the interests of public safety and as part of what the Court has called "community caretaking functions," Cady v. Dombrowski, supra, 413 U.S. at 441, 93 S.Ct. at 2528, automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.

Opperman, 428 U.S. at 368-69 (footnote omitted).

In Opperman, the vehicle was impounded after it had been parked illegally in a municipal parking lot and had been ticketed twice. Opperman, 428 U.S. at 365-66. There is absolutely no hint in the opinion that the vehicle was impeding traffic or causing a safety hazard at the time it was impounded. There is no indication in the opinion that the police should have considered less drastic alternatives before impounding the car. Had this Court thought the impoundment defective, that fact would have been reflected in the opinion.

This Court's decision in Opperman implicitly stands for the proposition that an impoundment is lawful when it is made pursuant to usual police practices as part of the general police community caretaking function, and that when an

impoundment of a vehicle comes within that caretaking function, the courts will not delve further to determine whether the impoundment was actually necessary or whether a less drastic alternative could have been used.

The general guidelines implicit in Opperman and the touchstone of reasonableness, which is the ultimate standard of the fourth amendment, are sufficiently definite to allow the lower courts to determine whether particular impoundments are legal. The final result will depend upon a case-by-case analysis. An attempt to further define what would be reasonable is neither necessary nor achievable, and does not provide an adequate ground for review of this case.

B. The decision by the Wisconsin Supreme Court carefully and fully considered the issues and decided them correctly.

The decision of the Wisconsin Supreme Court recognized that automobiles are entitled to a reduced expectation of privacy, but that the ultimate fourth amendment standard of reasonableness is nonetheless applicable to searches involving automobiles. State v. Callaway, 106 Wis. 2d 503, 508-10, 317 N.W.2d 428, 431-32 (1982) (App. 8b-11b, appendix references are to the appendix filed by the petitioner). The Wisconsin Supreme Court applied this reasonableness standard to determine that the initial impoundment of the vehicle was reasonable, under the facts of this particular case.

The court did not hold that any automobile may be impounded at any time without reasons or justification. Rather, the court simply held that in this particular case it was not unconstitutionally unreasonable for the police to impound the automobile. The police had arrested the driver, who was the sole occupant of the automobile, on an unrelated traffic offense and were going to remove him to the police station, leaving the car unattended; the car had been stopped in a no parking area; and the driver, when asked, knew of no one who could come and take charge of the car. The driver was given the choice of having someone else take charge of the car or having it towed or driven by the police to the impoundment area. He allowed the police to drive the car.

Under these circumstances, the Wisconsin Supreme Court found it was reasonable for the police to seek to protect the car from theft and vandalism and to protect themselves from claims of negligence by impounding the car for safekeeping. Callaway, 106 Wis. 2d at 513; 317 N.W.2d at 434; App. 17b-18b.

This case involves a narrow factual question regarding this particular impoundment. Any speculation about whether the police department policy involved here would lead to unreasonable impoundments in other situations is not appropriate. This case is limited to its own facts.

This case was decided on the grounds that the impoundment was reasonable. The issue before the Wisconsin Supreme Court was not whether the petitioner gave a valid consent to the im-

poundment. The court's discussion of consent was merely part of the analysis of the reasonableness of the seizure. There is no basis for this Court to accept this case in order to explore this limited aspect of the case.

The decision of the lower court is not erroneous and does not evidence a misunderstanding or misapplication of guiding principles of constitutional law. It is not this high Court's function to review a case under these circumstances. Cf. National Labor Relations Board v. Pittsburgh Steamship Company, 340 U.S. 498, 502 (1951).

C. The decision of the Wisconsin Supreme Court does not create a conflict with other state court decisions.

Petitioner urges this Court to accept review of this case in order to

resolve a perceived conflict between this decision and decisions of other state courts. However, the cases relied upon by petitioner to demonstrate this conflict are distinguishable on their facts, and thus do not evidence a real and substantial conflict in the law.

The Wisconsin Court of Appeals had attempted to follow the decisions of other state courts in finding the impoundment illegal. The Wisconsin Supreme Court, in reversing the Wisconsin Court of Appeals, accepted the basic rule requiring consent or reasonable police need as a prerequisite to impoundment and found that standard to be met here. The Wisconsin Supreme Court, in so doing, distinguished decisions of other jurisdictions on their facts. The Wisconsin Supreme Court stated:

In analyzing the question of what constituted a lawful impoundment as a condition precedent to a warrantless inventory search, the court of appeals concluded that based upon the decisions of several other courts, a vehicle is lawfully impounded if the owner or driver gives his or her informed consent or if there is shown to be a reasonable police need to impound the vehicle. See: State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979), and cases summarized therein. Applying this standard to the facts of this case, the court of appeals concluded that the impoundment in the case at bar was not lawful. We reject this conclusion of the court of appeals, however, and hold that the facts of this case satisfy that standard as Callaway was informed that the car would be impounded if he could not suggest another driver the police could contact and he consented to the impoundment of the vehicle and voluntarily surrendered his keys to the officer.

We note that several of the cases analyzed by the court of appeals are factually distinguishable from the case at bar and our decision in this case is not necessarily inconsistent with them. For example, in State v. Bales, 15

Wash. App. 834, 552 P.2d 688 (1976), the impoundment was found unconstitutional because the defendant indicated that a friend could arrive in a short time to pick up the car and, thus, the impounding of the car was unnecessary. Similarly, in State v. Goodrich, 256 N.W.2d 506 (Minn. 1977), the defendant arranged to have his brother pick up the car. In Granville v. State, 348 So. 2d 641 (Fla. App. 1977), the car could have been left where it was parked in a friend's driveway and in People v. Miller, 7 Cal. 3d 219, 101 Cal. Rptr. 860, 496 P.2d 1228 (1972) the defendant expressly stated that he preferred to assume the risk of leaving his property in the car.

In light of the fact that Callaway was given the three alternatives for the removal of the automobile, the fact that the car was illegally parked at the spot where it was pulled over, and the fact that after a thorough search of the record, we find no indication that the impoundment was a mere pretext for searching the car and the defendant has not argued as much to this court, we hold that the impoundment of Callaway's car was reasonable and, thus, it [sic] not violative of the fourth amendment prohibi-

> tion against unreasonable searches and seizures.
>
> We now discuss the question of the reasonableness of the inventory search made of the car, including the locked glove compartment, since we have concluded the impounding of the vehicle was necessary and reasonable because of the need to protect the vehicle from damage, theft or vandalism and because Callaway was given three alternatives for the removal of the illegally parked car.

Callaway, 106 Wis. 2d at 513-14, 317 N.W.2d at 434; App. at 15b-18b (emphasis in original).

It cannot be said that the Wisconsin Supreme Court's decision departs from other state court decisions by failing to adopt a consent or reasonable police need or cause requirement as a prerequisite to impoundment, for it appears to adopt and apply that standard.

The determination of the reasonableness of an impoundment depends upon

the facts of the particular case. Differences in results from other state cases is due to differences in the facts. Such differences do not create the type of "conflict" which this Court should resolve.

This Court has stated that its discretionary review by certiorari should be reserved only for those "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." NLRB v. Pittsburgh Steamship, 340 U.S. at 502 (emphasis added).

A real and embarrassing conflict of opinion and authority which would justify review does not exist here.

D. The Wisconsin Supreme Court did not err in failing to require the petitioner's consent to the inventory search, and this is not the appropriate case to decide when or whether an inventory search of an impounded vehicle must be conditioned on the consent of the owner or driver who is present at the scene.

Opperman involved an automobile which was illegally parked and the owner or operator of the automobile was not present at the time of the impoundment. The Court in Opperman did not have occasion to discuss whether the consent of the owner or driver is necessary if he or she is present.

However, the mere fact that this Court has not previously addressed an issue, without more, is not a sufficient ground for certiorari review.

This case is not a proper vehicle for raising the issue. In the Wisconsin Court of Appeals the petitioner did not raise the issue of whether consent from an available owner or driver is a prerequisite to a lawful inventory search, and the Wisconsin Court of Appeals did not address that queston. Although petitioner belatedly raised the issue in the Wisconsin Supreme Court, that court did not directly address the issue. By upholding the search, the court apparently rejected petitioner's argument. Callaway, 106 Wis. 2d at 515-18, 317 N.W.2d at 435; App. at 18b-24b. Nonetheless, this issue has not had the full consideration below which would make it appropriate for review here.

In addition, this case is inappropriate for review because there is evidence in the record which demonstrates

that the petitioner, who was driving the car, was not the owner of the car. Callaway, 106 Wis. 2d at 504 n.1; 317 N.W.2d at 429 n.1; App. at 27b n.1. This Court's ruling regarding whether consent of an owner of a car, who presumably knows the contents of the car and can decide whether or not he wants it searched, might be of no significance where the driver is not the owner. Where the driver is not the owner, he might not know whether there are items in the automobile which the owner would want secured. See United States v. Edwards, 577 F.2d 883, 884 n.23 (5th Cir. 1978). We have no record in this case establishing this petitioner's actual relationship to the car and no basis for determining whether he could properly have consented to its search. A casual driver of another's car might

well not have the same status for this purpose as the owner. The unresolved facts in this case make it a poor case for this court to review in order to resolve the question presented.

Review is also unnecessary here because the Wisconsin Supreme Court's implicit holding that consent to the inventory search is not necessary is correct and in accord with this Court's decision in Opperman. Requiring consent may serve one purpose of the inventory search, the protection of the owner's property, but it does not serve the purpose of protecting the public and the police. This Court rejected a "consent theory" in Opperman because an inventory search is not exclusively for the purpose of protecting the car owner. Opperman, 428 U.S. at 376 n.10.

E. Review by this Court is not necessary to determine whether the scope of a lawful inventory search includes a locked glove compartment.

This Court in Opperman found that it was not unreasonable for the police to search an unlocked glove compartment as part of an inventory search. Opperman, 428 U.S. at 376 n.10.

The Wisconsin Supreme Court correctly concluded that the fact that the glove compartment in this case was locked is not constitutionally significant. The Court carefully limited the allowable scope of the inventory search to the purposes which justify such a search. Callaway, 106 Wis. 2d at 516-18, 317 N.W.2d at 435-36; App. 19b-23b. This decision is in accord with federal decisions. See United States v. Martin, 566 F.2d 1143, 1145 (10th Cir.

1977); United States v. Barnes, 604 F.2d 121, 166 (2nd Cir. 1979).

In addition, this Court's recent decision in United States v. Ross, 50 U.S.L.W. 4580 (1982), although not discussing inventory searches, is not inconsistent with this result.

CONCLUSION

Based upon the legal authorities and arguments stated herein, the respondent respectfully asks this Court

to deny the petition for writ of certiorari.

Respectfully submitted,

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Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Petitioner, Dennis Callaway, files this reply pursuant to Rule 22, Rules of the Supreme Court of the United States, to correct certain factual inaccuracies in Respondent's Brief in Opposition.

On page 17 of its Brief, Respondent asserts that Petitioner did not raise, in the Wisconsin Court of Appeals, the issue of whether consent from an owner or permissive driver is a necessary prerequisite to a valid inventory search. However, Petitioner

did argue that while the consent issue need not be reached because the seizure was clearly illegal, the New Jersey Supreme Court had also held that consent was a necessary prerequisite to an inventory search. Brief in Wisconsin Court of Appeals, p. 25, n. 6. Moreover, Petitioner broadly argued in that court that the police should have explored reasonable alternatives to seizure and inventory, including consent to forego the inventory. Id., pp. 22-26.

Accordingly, Petitioner submits that the issue was fairly raised in the state court of appeals. In any event, the issue was undisputably raised in the state supreme court and Respondent concedes that that court rejected Petitioner's argument.

Respondent further contends that there is evidence in the record that Petitioner was not the car's owner. Brief in Opposition, pp. 17-18. However, the evidence more precisely is that Petitioner was not the

titled owner. He was in all respects treated as the actual owner, to the extent that the police listed Petitioner as the owner on the inventory report following search of the car. Petitioner had been stopped, while driving this car, by the same officer who arrested him, only two weeks before the arrest. The officer himself thus deduced from this prior encounter that Petitioner indeed owned the car (P.H.: 12).

No contention has ever been made that Petitioner did not have at least permission to drive the car. To the contrary, Petitioner asserted in the Wisconsin Supreme Court that he was purchasing the car at the time of arrest, and had exclusive dominion and control over it. Brief in Wisconsin Supreme Court, pp. 33, n. 10. If there is a deficiency in the record, moreover, it was occasioned by Respondent's claim, in the trial court, that ownership was irrelevant to the issue. 103 Wis.2d at 396-398, 308 N.W.2d at 901-902.

On a final unrelated point, Respondent contends the decision below did not attempt to justify the seizure of the car on a consent theory. Brief in Opposition, pp. 9-10. The decision speaks for itself, and needs no further explication. It bears mention, however, that counsel for Respondent, at oral argument below, specifically and unequivocally invited the court to justify the seizure on the basis of consent—the very issue Respondent now claims was not "(t)he issue before the Wisconsin Supreme Court."

CONCLUSION

Petitioner respectfully requests the relief specified in his Petition for Writ of Certiorari.

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